I N D E X

(THE TRIBUNAL RESERVES ITS JUDGMENT AND ADJOURNS TO A TIME TO BE FIXED AND ANNOUNCED.)

Friday, 16 April 1948

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Court House of the Tribunal
War Ministry Building
Tokyo, Japan

The Tribunal met, pursuant to adjournment, at 0930.

Appearances:

For the Tribunal, all Members sitting, with the exception of: HONORABLE JUSTICE LORD PATRICK, Member from the United Kingdom of Great Britain, not sitting from 0930 to 1712.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

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(English to Japanese and Japanese to English interpretation was made by the Language Section, IMTFE.)

Whalen & Morse

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now in session.

THE PRESIDENT: All the accused are present except UMEZU and SHIRATORI who are represented by counsel. The Sugamo Prison surgeon certifies that they are ill and unable to attend the trial today. The certificates will be recorded and filed.

General Vasiliev.

GENERAL VASILIEV: The defense invents alleged contradictions in the testimony of the Soviet and Mongolian witnesses and pays exaggerated attention, for instance, to the clarification of the question how many Soviet border guards were there on the Zaozernaya Hill - 32 or 30.

But the defense passed over in silence the testimony of these witnesses to the effect that the territory which later became the scene of the fighting, had been guarded either by Soviet or by Mongolian border guards since old times, thus attempting to pretend that such testimony was never given.

We submit that the Tribunal cannot ignore this testimony of the six eye-witnesses, who established beyond any doubt the fact that in both cases the border line in those areas was thoroughly guarded by the Soviet and Mongolian border guards. In the light of the fact

established beyond any reasonable doubt, that in both cases (events in the Lake Khassan area and in the Nomonhan area) as regards the border issue the truth rests with the Soviet side, it should be clear to the Tribunal that territorial claims of Japan were only a pretext for the initiation of an aggressive war. This pretext was to serve the purpose of justification of the military operations in the eyes of the public opinion and also the purpose of using the form of an "incident" in the most advantageous way until the moment when the course of events would determine the prospect of the future development. It is natural that under these conditions the initiative in military operations could belong only to the Japanese side. And so it was in reality.

We see no necessity of repeating all copious factual material introduced by us to the Tribunal on this issue. (T. 38,286, 7,755, 7,777, 7,811, 7,812-13, 7,846-8, 38,364-7, 38,532-41)

We shall touch only upon certain points.

The defense unblushingly attributed to the President of the Tribunal the statements which he never actually made. Thus, in their summation the defense quote the words of the President of the Tribunal in such a way that make them sound as if he said that in

the Lake Khassan area there was "no encroachment by one nation on the territory of another with a view of retaining that territory." (T. 42,737)

Actually as the transcript shows (T. 7,803) the President suggested that the defense should stop their examination which missed the material issues. His words were: "This is a useless cross-examination which, I respectfully suggest, misses the whole point.

"The question whether there was an encroachment by the Japanese or the Russians on particular territory could be determined only by the conduct of their armed forces or some other official body connected with one or other. The mere movement of private individuals across a boundary line, even of religious bodies, would have no bearing on what the boundary line was. The question here is whether there was an encroachment by one nation on the territory of another with a view to retaining that territory. . ."

It is clear that this is the correct approach to the settlement of this issue, but the defense interprets this statement as the settlement of the issue in substance favorable for themselves.

The defense maintained that there were contradictions in the testimony of the Soviet witnesses Batarshin, Chernopyatko and General Grebennik as to

as to the strength of the Soviet troops on the hills Zaozernaya and Bezymyannaya at the time when the armed clashes broke out. (T. 42,741-42) But in reality, as it may be easily seen from the record, there are no contradictions whatsoever in the testimony of these three witnesses. In the affidavit of Major Batarshin mention is made of thirty border guards who were on the hill Zaozernaya on or about July 15 and of sixty soldiers (30 border guards and a reserve platoon) when the first armed conflict occurred, that is on July 31.

The Witness Chernopyatko gave the same figures, namely, that on the night of July 30-31, thirty border guards and a reserve platoon also about thirty men strong participated in the clash from the Soviet side. The witness stated: "Originally there were fewer border guards, (i.e., on the Zaozernaya Hill), but since the 16th, there were 30 border guards." (T. 32,175)

When the question was put to him: "That is correct, only Soviet frontier guards took part in that fighting, is it not", he answered: "No, that is not correct. During that night one platoon of field troops came up to us and they also participated in the battle.

"Q That was about thirty men, was it?

"A Yes, thirty men." (T. 32,186-88)

The figure referred to in the affidavit of Major General Grebennik tallies with the figures stated by the witnesses Batarshin and Chernopyatko. In defining the strength of the border guard garrison these two witnesses spoke only about the Zaozernaya Hill, while Grebennik testified concerning the number of border guard troops along the entire front line from the Hill Zaozernaya to the Hill Bezymyannaya. In the course of his testimony the witness Grebennik testified: "By that time the reinforcements of field troops were only reaching the battlefield and the Bezymyannaya and Zaozernaya Hills were defended only by the border guard outfits which had been somewhat reinforced by the reserves I had at my disposal. (There were 92 border guards on the two hills which includes 60 men on the Zaozernaya Hill)" (T. 38,296). Thus, we repeat, there are no contradictions between the testimony of Batarshin, Chernopyatko and Grebennik.

The defense also attempt to make a semblance of contradictions between the evidence of prosecution witnesses concerning the strength of the Japanese troops who participated in the attack on the night of July 30-31, 1938. In the evidence of the witness Batarshin, to which the defense refer, nothing is stated to the effect that on the night of July 30-31 the attack was

launched by Japanese troops 600-700 men strong; what is stated there is that as early as about July 15 Batarshin observed a concentration of no fewer than 600-700 Japanese soldiers on the border opposite the Hill Zaozernaya. As far as the attack on the night of July 30-31 is concerned, the witness testified that it had been carried out by "large forces", but he did not state what the strength of the forces had been. (T. 32,074)

Neither did the witness Chernopyatko state that the attack on the night of July 30-31 had been carried on by an infantry regiment. This witness testified that according to his estimate there had been almost a whole regiment strengthened by artillery in the Hill Zaozernaya area by July 31. The defense attempted to compel the witness to make categorical statements as to the strength of the troops, but they failed to achieve it as may be seen from the following answer of the witness: "I can't say that because I didn't see the regiment marching in columns, but those positions which were held by the Japanese soldiers in those entrenchments which were for artillery range, trench mortars, smoke for themselves. . . I did not see the regiment marching in columns headed by the commander, but judging by the numerical strength and by

the positions which had been previously prepared, I can assure the Tribunal that in that area was about a regiment of Japanese troops, reinforced by artillery and trench mortars." (T. 32,163)

As far as the testimony of General Grebennik is concerned there is no mention of this matter at all at the pages cited by the defense. The defense also failed in their effort to discredit the testimony of the witnesses Chogdon and Bykov in pointing out the alleged contradictions in their testimony on the question of the distance at which the border poles were set up between the three "obos" at the border between the Mongolian People's Republic and Manchukuo on the eastern bank of the Khalkin-Gol River. As the Tribunal knows from the testimony of Major Bykov before the outbreak of the fighting in the Nomonhan area the latter went to the eastern bank of the river together with Chogdon, commander of the 7th frontier guard outpost only once, in March 1939. At that time he saw the border monuments which showed the border line ("obo") and besides some markers of lesser importance in the shape of poles with inscriptions in Mongolian. In the opinion of the witness the distance between these secondary markers was one kilometer and a half. (T. 38,389-92).

As to Major Chogdon, who served as Chief of the 7th border guard outpost for a number of years, and as it may be seen from his testimony, knew all the features of the terrain very well, he, in addition to the testimony of Bykov, stated that the poles with the Mongolian numbers had been set up not along the entire border line but only in such places where it was difficult to trace the border line (T. 38,556)

The defense took pains to point out, according to the number of poles stated by Chogdon, those poles necessarily would be at a distance of 3-4½ kilometers one from another. We submit that this circumstance is of no importance. But it is important to establish only the fact that the border line in the Nomonhan area was defined both by ancient border markers, the so-called "obos" (the existence of which the Court may establish by any map at its disposal by the very names of the locality -- Nomonhan-Burd-Obo, Eris, Ulyn-Obo, Hulat Ulyn Obo) and by secondary border markers which, as may be seen from the testimony of Chogdon were set up in such places in which the Mongolian border guards had difficulty to find their bearings.

Further, the defense attempted to find contradictions between the testimony of Chogdon and Bykov in that a Russian officer not familiar with Mongolian

on the border poles, whereas Chegdon who had a command of the Mongolian written language had spoken about Mongolian figures. In such a way the defense tried to make believe that they did not understand the fact that for a European, Mongolian words and Mongolian figures would look like characters.

Such "contradictions" as were discovered by the defense between the testimony of Chegdon and Bykov may only point to their utmost credibility and to the absence of any agreement between them. Every criminalist knows how unreliable is the testimony of witnesses which was given ten years after the events and which fully coincide with one another in the smallest details. We consider one of the essential features of a complete lack of credibility as to the testimony of a number of witnesses, just such a coincidence in the details.

After an analysis of the defense and prosecution evidence as to which side was right on the issue of where the border line ran, who initiated the hostilities in the Khassan Lake area and in the Nomonhan area, the defense realized that, contrary to the facts and documents, to attribute the initiative to the Soviet Union and to declare with all firmness that the Japanese side was right, would be impossible.

Hence there appeared the version mentioned

above of "no one is guilty." But since such a version quite obviously does not save the situation, the defense concentrated their arguments on the allegation that the Lake Khassan and the Khalkin-Gol events were not undeclared wars but "typical border incidents." (T. 42,722) From that follows that those events do not come under Article 5 of the Charter and must be excluded from the Indictment.

In seeking to prove that the hostilities at Lake Khassan and at Khalkin-Gol hiver were mere border incidents, the defense tried to find all kinds of features which would distinguish those events from ordinary wars. We are not going to disclaim that one feature of war, for instance, is the severance of diplomatic relations. But we draw the attention to the fact that the defense were careful to ignore a number of very important and decisive features, which distinguish the events near Lake Khassan and the Khalkin-Gol hiver from "typical border incidents." It is common knowledge that of border incidents it is typical that they occur in a spontaneous way, on the initiative of local agents, that only border guard units take part in the fighting. Besides usually the high point of the conflict does not last long. To avoid repetition we shall not refer to the particulars of these events which

were set forth in our General Summation. (T. 39,831-75)

The Tribunal remembers that (1) the beginning of the fighting near Lake Khassan was preceded by a diplomatic preparation which lasted more than half a month (T. 7,761), and there is no doubt that the Japanese Government was well aware of the progress of the preparation on the spot for large-scale hostilities; and it is also clear that the fighting operations were started and conducted under orders of the Japanese Government.

The outbreak of the fighting in the Nomonhan area had been preceded by a concentration of large Japanese armed forces (T. 7,846) and the Japanese Government was well informed about the developments (T. 7,856, 22,600) and large-scale military operations, in particular the organization of a special army, could not have taken place otherwise than upon the order of the Japanese Government. (2) Field troops participated in the fighting in the Lake Khassan and the Khalkin-Gol River areas. On the first occasion, the Japanese side had at least one reinforced division, on the second, a number of divisions. On both occasions artillery, including heavy artillery, took part in the fighting and in the hostilities at the Khalkin-Gol River, aircraft and tanks in a considerable quantity.

(T. 22,647-48; 23,038-39; appendix No. 9 to Ex. 766)

Defense counsel Messrs. Blakeney and Furness who dealt with these specific facts did not take upon themselves to contest the participation of field troops and the large-scale character of the hostilities. (T. 42,722) If defense counsel Mr. Yamaoka in contradiction with the facts called in his summation these military operations "armed clashes between the border guards," (T. 42,311) this must be explained not even by the incorrectness of his viewpoint, but simply by his not knowing the materials of the case.

(3) The period of hostilities in the vicinity of Lake Khassan continued about two weeks and in the Khalkin-Gol River area several months, from May to September 1939. (Ex. 766; Ex. 753) This factual aspect of the events shows quite clearly that they by no means can be called border incidents and the Soviet Union never considered them border incidents. It is surprising that the defense allege that these events were never regarded in the Soviet Union as wars (T. 42,726) when as far back as 7 August 1938 in his conversation with SHIGEMITSU, the People's Commissar for Foreign Affairs told him: "We think that it is impossible in this case to talk about a frontier incident, because artillery was put in operation by the Japanese side at

the very beginning . . ." (Ex. 2638) That statement of fact is especially true of the Khalkin-Gol River events which were hostilities on a considerably larger scale. We may remind the Tribunal that Commander of the 6th Japanese Army especially formed for conducting military operations in the Khalkin-Gol River area said in his order dated 5 September 1939: "The circumstances are now such that it is clear that the matter is beyond the limits of a mere frontier conflict." (Ex. 766, Appendix No. 12) Taking into consideration the peculiar features of Nomonhan and Changkufeng events the prosecution defined them as "undeclared aggressive wars" and as such they independently fall under Article 5 of the Charter. It must be borne in mind that Japanese imperialism in its criminal practice considered it more advantageous to conduct hostilities without any formal declaration of war, even post factum, trying to avoid the changes in its legal status as regards third countries, which changes under international law must have taken place if a state of war had been declared.

We do not even speak about the way the Japanese imperialists used for the realization of aggression the form of "incidents", kind of provocations serving as a pretext for seizing Manchuria and a considerable part of China, using huge armies without, however,

declaring a state of war and without severing diplomatic relations. The tactics of the Japanese imperialists applied in the Lake Khassan and in the Khalkin-Gol hiver areas aimed at making the further development of hostilities for attaining their aggressive aims dependent upon their results without binding themselves for the time being with a declaration of war.

On the other hand, the Soviet Union following her policy of peace was interested in avoiding by all means being involved in a big war, and therefore did not declare a state of war and did not break off diplomatic relations with Japan, confining her (the U.S.S.R.'s) military operations to defense and the restoration of its interests infringed upon by the Japanese aggressors.

The true significance of undeclared aggressive wars in the Lake Khassan and Khalkin-Gol hiver areas becomes clear in the light of general aggressive policy of Japan toward the Soviet Union. These events cannot be considered otherwise but in close connection with the general system of planning and preparation by the Japanese imperialists of a large-scale aggressive war vis-a-vis the U.S.S.R.

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give them too slim a chance, invented the third version that the issue of responsibility must be considered dropped in connection with the agreement of the parties about the cessation of hostilities and in connection with the Neutrality Pact of 1941.

We are compelled to repeat what was already said in the summation: "This allegation has no grounds because in order to absolve responsibility, a special reference to an amnesty contained in a subsequent diplomatic act should be required. As is known, no such reference has ever been made. Besides the Changkufeng events are not a separate isolated fact, but a link in the general system of aggressive actions of the Japanese imperialists against the U.S.S.R., and moreover, a link in the aggression of imperialistic powers against all democratic nations.

Finally, if the defense wants to consider the question of responsibility dropped because in April 1941 the Neutrality Pact was concluded between Japan and the Soviet Union, which seemed to sum up previous relationship between the two countries, then such reason is groundless in view of the above-stated considerations, and also because this treaty, as it will be conclusively proved later, was concluded by Japan with a treacherous purpose and, therefore, that treaty accords neither

moral nor legal rights to refer to it." (T. 39,853-54)

The defense have advanced absolutely no new considerations and did not make their conclusions more convincing by repeating many times one and the same thing. We cannot pass over in silence the defense's using their summation for highly improper attacks on one of the countries, calling it "a puppet", a country which participated in war with Hitlerite Germany and imperialist Japan, namely the Mongolian People's Republic. In this case the defense only repeat propagandist versions of the Japanese imperialists who of old attempted to violate the sovereignty of the Mongolian People's Republic for their aggressive purposes.

The defense desire to substantiate this by asserting that the Mongolian People's Republic allegedly could not conclude a treaty of mutual assistance with the Soviet Union and therefore the actions of Japan in the Khalkin-Gol River area did not constitute aggression against the Soviet Union. We realize that of course it was quite unpleasant for the accused to deal not with a comparatively weak Mongolian Army, but with the Soviet Army. But that is another matter.

The independence of the Mongolian People's Republic was formally recognized by the Chinese Government on January 7, 1946. However, long before that

the Mongolian People's Republic had been a sovereign state having her own territory, people, government and relations with other countries. As is known the autonomy of Outer Mongolia as a part of China was proclaimed as far back as 1911. In Article 5 of the Tripartite Agreement of Russia, Outer Mongolia and China of June 7, 1915, it was specially provided that "China and Russia, conformably to Articles II and III of the Sino-Russia declaration of . . . 23rd October 1913 - recognize the exclusive right of the Autonomous Government of Outer Mongolia to attend to all the affairs of its internal administration and to conclude with foreign powers international treaties and agreements respecting all questions of a commercial and industrial nature concerning autonomous Mongolia." (Ex. 2303)

On November 5, 1921, the Soviet Government recognized the Mongolian People's Government as the only lawful government of Mongolia and sent their Ambassador Plenipotentiary to the capital of the Mongolian People's Republic and their consuls to Mongolian cities. On March 12, 1936, a protocol of mutual assistance was signed between the Soviet Union and the Mongolian People's Republic. (Ex. 214)

Consequently the Japanese imperialists were perfectly aware that an attack on the Mongolian People's

Republic would at the same time be hostilities vis-a-vis the U.S.S.R.

No grave importance should be attached to the defense's discourse about the inexactitude which was made by inadvertence in the wording of Count 51 of the Indictment. (T. 42,721)

It is obvious that the murder of certain members of the Soviet and Mongolian armies took place on the territory of the Mongolian People's Republic, but not on the territories of the Mongolian People's Republic and the U.S.S.R. Counts 26 and 36 of the Indictment leave no doubt whatsoever as to that matter.

The defense could not but recognize the fact that the Japanese Army General Staff worked out strategic and operational plans vis-a-vis the Soviet Union, and that their contents were stated in the prosecution evidence. (T. 42,790-3) But the defense made every effort to prove that these plans were not plans of aggression and therefore did not entail any responsibility. To attain these aims the defense used flagrantly demagogical methods.

Here is one of them. Having pointed out that all countries having general staffs usually work out operational plans and that the drafting of them is the routine duty of the staff officers, the defense, without

mentioning the contents of the plans connected with the course of state policy, contended that "If at the same time it is to be accounted criminal vis-a-vis foreign nations to carry out that duty, it can be only by declaration of the novel doctrine that the mere profession of arms has been branded as criminal. . ." (T. 42,791-2)

We would not be surprised if the defense having once disregarded common sense carry their contentions to complete absurdity, alleging that if following the German leaders the Japanese statesmen, military and diplomatic officials, are brought to justice in criminal proceedings, it means that a novel doctrine has been declared that any government service is criminal.

We shall reply to this caviling method with the Russian proverb: "The wolf is beaten up, not because he is grey, but because he has eaten a lamb."

All other arguments of the defense are demagogical to the same extent and are not any more convincing than this one.

The defense found it possible to misquote a statement made by Mr. President to corroborate their false allegations. They quoted Mr. President's words in the following way: "We know . . . (plans) are prepared in the general staff offices of other

countries." (T. 42,790-1) Using only those phrases which support their contention that plans of general staff offices cannot serve as evidence of the planning of aggression, the defense have clearly distorted Mr. President's idea. It can be easily seen, if one reads the whole of Mr. President's statement referring to the testimony of a witness. It reads as follows: "I suppose we know that plans are prepared in the General Staff offices of other countries, but what they would be about we would not know nor would he." (T. 8,115)

The President of the Tribunal quite correctly attached the main importance to the contents of the plans prepared by the General Staff offices. That is the substance of the issue.

The prosecution have convincingly proved the contents of strategic and operational plans of the Japanese General Staff to be plans which were a vital part of the over-all plan of Japan's aggression against the U.S.S.R.

The contents of the plans of the Japanese General Staff bear witness to the aggressive nature of the contemplated hostilities. The Tribunal knows from the testimony of the witnesses, Japanese generals and officers, that the General Staff of Japan planned, year after year, the seizure by the Japanese armed forces

of the Soviet Maritime Province (T. 8,140-4, 8,130-2) of the Soviet Zabaikalie (T. 8,432-3, 38,424), Northern Saghalien and Kamchatka. (T. 8,100)

The planning of seizure of those territories lying hundreds and thousands of kilometers away from Japan cannot be accounted for and justified by any considerations of Japan's defense. It proves incontestably that the strategic and operational plans of Japan's General Staff constituted the military aspect (T. 8,101) of the over-all plan of aggression and were <u>plans of aggressive war.</u>

The defense cannot be saved from this conclusion by abstract discourse concerning the questions of planning war against the U.S.S.R. from the point of view of the "military maxims" (T. 42,794) taken apart from the specific historical situation and from the aggressive course of Japan's foreign policy towards the U.S.S.R.

The aggressive and offensive plans mapped out by Japan's General Staff and by the Kwantung Army Staff are called "defensive" by the defense on the ground that "a vigorous offense is the best defense."(T. 42,794)

". . . as common sense tells us," say the defense, "the ambition of any army, once war has commenced, is to take the offensive. . . This is the

ambition of an army fighting a war of aggression, it is the ambition of the army fighting a war of defense. Occupation of enemy territory . . . has nothing whatever to do with the character of the war . . ."
(T. 42,793-4)

This reasoning of defense counsel Blakeney and Furness is a universal formula justifying all kinds and forms of armed aggression in the past, present and future.

In fact, Japan's General Staff in preparing plans against the U.S.S.R. acted not on the basis of "maxims of military art" according to the present formula of the defense counsel, but on the basis of the offensive strategy in conformity with the aims of aggression.

The defense have forgotten what answers were given in court to their questions by the witness Lieutenant General HUMAKIHI, former professor of Japan's General Staff College and Director of the Total Warfare Institute. HUMAKIHI stated the substance of the doctrine of the Japanese General Staff who acted on the premise that ". . . it is necessary that the Japanese expand overseas, particularly expand on the continent of Asia. . . Furthermore, in order to be able to carry on warfare the natural resources of the continent

are essential and must be utilized. This fact is well attested to by the late war, that is, the war of Greater East Asia. . . And, therefore, as far as Japan was concerned, it was necessary that she have a strong foothold on the continent politically, economically and militarily. This being the fact and this being the reason, Japan strategically must always point to the offensive." (T. 32,036-7)

Replying to the next question, MUMAKAMI testified: ". . . as I have said before, overseas expansion was necessary for Japan as a nation; and while undertaking such an expansion war may possibly occur, if such a war occurred Japan must take the offensive and gain control of certain strategic and vital areas." (T. 32,037)

Considerable evidence of aggressive intentions vis-a-vis the U.S.S.R. introduced by the prosecution and the testimony of the witness MUMAKAMI cited above destroy, as a house of cards, the whole concept of the "defensive stragegy" of Japan made up by some defense witnesses, the unbridled militarists like TAMAKA, Shinichi and KASAHARA (Ex. 2676, Ex. 2670) and the defense's dissertation on the "military maxims."

Beside the strategic and operational plans prepared by the General Staff Office, political and

economic plans for preparation and waging of war were being worked out by other state agencies of Japan. All of these plans were in complete coordination and were based on one and the same premise -- aggression against the U.S.S.R. and other nations.

Of course, we shall not find the words "Plan of Japan's aggression" in the plans themselves. The words "Japan's defense" are repeated dozens of times. But it is not the title that matters. It is known that the Japanese militarists widely used defensive slogans to justify their expansionist policy and to conceal their preparation for aggressive war.

In their summation the prosecution analyzed the contents of the strategic and operational plans of the General Staff not as an isolated subject, but as a vital link in the chain of measures aimed at Japan's preparation for aggressive war against the U.S.S.R. (Sections H-11, H-50, H-56, H-62). It should not be forgotten that, as one of the members of the General Staff Office testified, "operational plans are made by the General Staff Office under the direction of the Chief of General Staff, and then after it has been revised and sanction received from the Throne it becomes a formulated operational plan of the Army." (T. 8,110)

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It is necessary to remember that the General Staff, as well as the War Ministry, was headed by the organizers of the conspiracy of aggression who paid great attention to the planning and preparation of aggressive war against the U.S.S.R. It is not a mere chance, therefore, that of 25 defendants in this case, fifteen are former military leaders of Japan, and among these there are one field marshal, twelve generals and one admiral who were in some way or other concerned with the drafting or implementation of strategic and operational plans of Japan's General Staff.

The defense point out the fact that strategic and operational plans of the General Staff were prepared not only against the U.S.S.R. but against the United States, Great Britain and China as well. (T. 42,796)

But what does it change? The point is, what was the nature of these plans? We know, and the prosecution evidence shows, that it was precisely these plans of Japan's General Staff that were carried out vis-a-vis China and in the Pacific War. (T. 8,112)

Hence, it is clear what these plans were and, consequently, such parallels are not favorable to the defense. It weakens the defense case to point out that these plans for aggressive war, as the prosecution

has shown, were prepared by the Japanese General Staff not only against the U.S.S.R., but against other freedom-loving nations as well.

And, finally, does the fact (emphasized by the defense for their own purposes) that the strategic and operational plans were prepared annually, diminish the importance of these plans? Evidently not.

Moreover, the prosecution emphasizes that, as is seen from the testimony of one of the witnesses, ". . . even during a year plans were constantly revised to move in accordance with the international situation." (T. 8,115)

Who, then, can concur with the defense in the contention that if plans are prepared annually, then they are common plans prepared "against eventualities?" (T. 42,795)

Another and more important question may be put: Did the nature and substance of the plans change during their annual drawing up and redrawing? By way of a reply we shall quote the words of the accused OSHIMA, the discussion of which the defense have avoided:

> ". . . for the last 20 years all plans of the General Staff had been worked out for an attack on Russia and were still directed towards such an attack." (Ex. 839-A)

Thus, Japan's General Staff prepared annually strategic and operational plans for aggressive war against the Soviet Union in conformity with the expansionist course of the national foreign policy and with the plan of conspiracy against peace, awaiting the most favorable moment for the realization of those plans.

As was to be expected, the defense paid special attention to the "Kantokuen" plan. That plan was worked .ut by the Army General Staff, War Ministry and the Kwantung Army Headquarters after Germany had treacherously attacked the Soviet Union from the west in 1941, i.e., when the situation for such an attack against the U.S.S.R. from the east was developing most favorably for Japan. The Tribunal knows that as early as July 2, 1941 an Imperial Conference was held which decided the basis on which the "Kantokuen" was prepared. (Ex. 779)

The defense allege that the Kantokuen was not a plan of aggression against the U.S.S.R. The main defense evidence concerning the Kantokuen consists of the testimony of the witnesses TANAKA, Shinichi and KASAHARA (Exs. 2676, 2670), both of whom testified to a greater extent on their own behalf rather than on the behalf of these accused since in fact they had been active accomplices of the latter.

Using their testimony the defense contend that "the Kantokuen was designed to strengthen the Kwantung Army in case of development of the national policy of 2 July" (1941) (T. 42,814) and as a measure "to strengthen preparedness against the U.S.S.R." (T. 23,330) Mentioning that decision of the Imperial Conference of July 2, 1941, the defense wish to see its purport in the decision not to intervene in the war of Germany against the U.S.S.R. (T. 42,839)

But it is sufficient to read that decision to see clearly that such is not the case. To avoid any misinterpretation of that decision given by the defense we quote its contents once more:

> "Though the spirit of the Tripartite Axis will form the keynote of our attitude toward the German-Soviet war, we shall not intervene for a while but take voluntary measures by secretly preparing arms against the Soviet Union. Meanwhile, diplomatic negotiations will be continued with detailed precautions; and should the conditions of the German-Soviet war progress favorably to Japan, we shall execute arms to solve the northern problems, thereby securing stability in the Northern regions." (Ex. 779)

Consequently, this most important decision

which defined Japan's national policy vis-a-vis the U.S.S.R. firstly, establishes that in accordance with the Tripartite Pact, Japan was under obligation to take Germany's side against the U.S.S.R.; secondly, establishes that Japan would not intervene in that war for awhile (i.e. up to a certain moment); thirdly, establishes that Japan would secretly prepare for the war vis-a-vis the U.S.S.R.; and fourthly, defines the time of the attack on the U.S.S.R. to be the moment when conditions at the Soviet-German front became favorable.

That is what Japan's national policy adopted on July 2, 1941, i.e. immediately after and in direct connection with Germany's attack on the U.S.S.R. consisted of, and that is what was carried into effect.

The defense realizing that no play with words presented as an analysis of the decision can change its clear contents, try to cast a reflection on this document, alleging that it "is uncertain as to origin, having no certificate . . ." (T. 42,838)

This is truly the case of not recognizing one's own ilk. The certificate introduced to the Tribunal (see the certificate to Ex. 588) is signed by Chief of the Archives Section of the Japanese Foreign Ministry and shows that this decision is an official

document of the Japanese Government. Then what doubts can there be as to its origin?

Finally, the defense resorts as previously to the decision of 6 September 1941 which allegedly meant only "that Japan will not take the initiative for military action . . ." (T. 42,841) The defense here repeats an old error (T. 39,906) quoting the first part of that decision wherein it is stated:

> "In case of an interrogation as to Japan's attitude toward the Soviet Russia, it will be replied that Japan will not take the initiative . . ." etc. (Ex. 779, p.4)

We have to repeat that this decision sets forth not the policy but an answer, the wording of which was apparently identical with the answer previously given for the purpose as was explained by MATSUOKA "to deceive the Russians." (Ex. 796, p.1)

The "Kantokuen" plan which, as the defense have admitted, was designed to serve the purpose of the development of national policy of July 2 (T. 42,814) could not but be a plan of aggression against the U.S.S.R. if only because it was drafted in implementation of the decision of 2 July 1941.

The analysis of the contents of the "Kantokuen" plan given in the prosecution summation (Sections

H-154-160) supports this conclusion which is the only right one and which has been substantiated by all the evidence in this case. The defense have allotted much room in their summation to criticizing prosecution evidence on the "Kantokuen" but it would be sufficient to give some examples to show the biased and groundless character of this criticism.

Thus, for instance, touching upon the testimony of the witness KUSABA, (T. 42,803) the defense confined its discussion to deciphering the term "Kantokuen" and passed over in silence KUSABA's testimony about the contents of some measures provided for by the plan and about the fact that these measures were taken in connection with Germany's attack on the Soviet Union. (T. 8,169)

As to the testimony of the witness SEJIMA, Ryuzo, the defense have not mentioned the fact that the mobilization of 300,000 men in the summer of 1941 was carried out in Japan not for the purpose of the replenishment of the army in general, but for the specific purpose "to reinforce the Kwantung Army." (T. 8,101)

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Quoting the testimony of the witness MURAKAMI concerning the plan of 1942 for the second time, in the section dealing with the "Kantokuen" (T. 42,802) (for the first time this testimony was quoted at transcript page 42,797), the defense however have not quoted his answers directly relating to the "Kantokuen" (T. 32,031). The prosecution witness MATSUURA fully corroborated before the Tribunal, the testimony contained in his affidavit (ex. 833). The defense failed in their attempts to confuse this witness during the cross-examination. They contrasted MATSUURA's testimony with the testimony of their two witnesses, KOTANI (ex. 3728) and HATTORI (ex. 3729), only as to separate episodes and the contentions made by these witnesses call forth reasonable doubts as to their objectivity. But still the defense spared no efforts in order to characterize this witness as incompetent and his testimony as not trustworthy, only because it exposed the accused.

Trying to impeach indiscriminately the reports of the German Ambassador and Military Attache introduced by the prosecution which had been sent from Tokyo to Berlin and which dealt with Japan's military preparations against the U.S.S.R., the defense referred to the fact that the information given to Kretschmer by the Japanese had been, according to his own admission "worthless"

(T. 42,805). If we turn to paragraph 3 of Kretschmer's affidavit (T. 24,619), we easily see first of all, that he stated that the information had been "often worthless" and not "worthless" in general, as it is now contended by the defense, and secondly that this testimony of Kretschmer has no relevancy to the question of measures carried out by the Japanese Army itself in 1941 for the preparation of an attack on the Soviet Union in realization of the "Kantokuen" plan.

The reports sent in 1941 by Ott and Kretschmer (the latter admitted that he at that time ". . . had been visiting the Japanese General Staff nearly daily. . .") (T. 24,618) speak for themselves and do not need now, in 1947 or 1948, any comments on the part of Ott and Kretschmer who at present, in connection with the changed situation, exert every effort to make black look white. The defense allege that the telegram wherein it was stated: "Japan's waging of a war against the Far Eastern Army, still considered as being in fighting trim, is not feasible before next spring, unless a moral collapse of the regime comes about" (Ex. 788-A, T. 7969), was sent a few days after the telegram of July 12, 1941 (T. 42,805) in which the replenishment of the Kwantung Army forces and other Japanese preparations for war were reported (Ex. 799, T. 7966-7). In that way the defense

wanted to show the inconsistency between those two documents. But in fact the first telegram (Ex. 788-A) was sent on October 4, 1941, i.e., not "a few days later" as the defense state in their summation (T. 42,805), but nearly three months later, after the telegram of July 12, 1941, had been sent (Ex. 799).

The defense could not contest specific facts of the preparations made by the Kwantung Army in 1941-42 for the attack on the Soviet Union which had been carried out under the "Kantokuen." They tried to present them as measures carried out for defensive purposes. Even the study of an occupational regime for Soviet territories conducted most urgently by the General Staff and the Kwantung Army Staff (T. 31,840; 31,933; 36,946) does not prove, in the defense's opinion aggressive intentions of Japan (T. 42,794).

In speaking of this, the defense remain silent about the fact that the aim of the occupation was to annex Soviet territories to the Japanese Empire (Ex. 684, 685, 682, 688-A, 690-A, 3372).

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The prosecution evidence has established that the mobilization plan of Japan adopted for the purpose of preparation of a war against the U.S.S.R. in the summer of 1941 was actually put into effect. After the secret mobilization the numerical strength of the

Kwantung Army more than doubled during several months in the summer and autumn of 1941. (Ex. 706, T. 8101-2) Besides this, Japan's General Staff and War Ministry carried out a deployment of troops against the U.S.S.R. in the Manchurian theater. The First Area Army comprising four armies, a separate army group and a reserve was deployed on the eastern border of Manchuria. The Second Area Army (later called the Third Area Army) which should comprise two armies and reserves was deployed at the northern boundary of Manchuria. Two armies were concentrated on the western border of Manchuria (T. 8100, 8141-44; Ex. 838, 835). But this was not all. The Japanese Army in Korea, the army in Inner Mongolia and the Northern Army (the Hokkaido Island) were ready to take actions against the U.S.S.R. (Ex. 833, 834, 724, 710). Thus in the summer of 1941, a Japanese army of more than 1,000,000 men strong was ready to invade the Soviet territory.

Even the data on the strength of the Japanese Army submitted by the defense, though minimized, may be used to show the immense scale of military preparations of Japan and of her preparedness to advance against the U.S.S.R. According to those data the Kwantung Army in 1942 had 700,000 men, 900 airplanes and 900 tanks (T. 42,821-25). But these data do not include the

strength of the Korean Army, of the Japanese Army in Inner Mongolia, of the reservists in the border areas of Manchuria (150,000), the so-called "national" armies of Manchukuo and Inner Mongolia. In total there were forces more than 1,000,000 men strong (T. 32,064).

But, in spite of the facts and contrary to the facts the defense make an unwarranted allegation that ". . . Japan was not prepared and could not have been intending to undertake a war against the U.S.S.R. either at the time of the Kantokuen, after its completion or prior to its commencement" (T. 42,802).

The defense wish to ignore the important role, the creation of a military base in Manchuria and Korea, played in Japan's preparedness to attack the U.S.S.R. (Ex. 712-18; 725-29).

It is necessary to deal with this matter separately. The defense admit that Japan took measures of a military nature in Manchuria, but contend that this fact alone does not warrant the conclusion that Japan had aggressive intentions (T. 42,828-9). But the prosecution never drew this conclusion from this one fact only or any other fact taken alone and isolated; this can be seen from the system of our argument. The Soviet prosecution in introducing evidence started with the establishment of the aggressive intentions of the Japanese

ruling clique against the U.S.S.R. (T. 7303-7434) and after adducing numerous facts showing the statements and the working out of these intentions and facts of open propaganda of the aggressive war against the U.S.S.R., proceeded with the presentation of other evidence always emphasizing their intrinsic inter-relation. This order has been preserved in prosecution summation on Soviet Phase; after a historical reference to the stages of Japan's aggression, Japan's aggressive intentions against the U.S.S.R. and propaganda of aggressive war were stated (T. 39,743-60); then it was specifically shown that aggressive policy toward the U.S.S.R. was the program of actions of the Japanese ruling clique which found its reflection in Japan's military plans and preparations for an aggressive war against the Soviet Union, and, in particular in the establishment of a military base in Manchuria and Korea (T. 39,760-804). All this evidence makes up an organic whole. Thus, for instance, military plans or, if we speak of the military base in Manchuria and Korea, military installation and measures showed the aggressive character of the war which was being prepared. But the defense considering different facts of prosecution evidence in isolation and in this instance the evidence showing the military and material preparation of aggression against the U.S.S.R. by Japan, declare

that each facet of evidence taken separately does not prove Japan's aggressive intentions. To support this, the defense referred to the testimony of prosecution witness TAKEBE to the effect that the Kwantung Army had been stationed in Manchuria for the purposes of defense and that all military installations served the same purposes (T. 42,832). But the defense failed to mention the unusual interpretation of the term "defense" which this witness had had in mind when he explained that the word "defense" can be said to have a very broad meaning, and for example, the occupation by Japan of Manchuria was also called "defense" (T. 31,920).

We again invite the Tribunal's attention to the fact that the prosecution evidence has firmly established that the construction of military objectives in Manchuria and Korea in its nature was offensive and that by 1941 the military base constructed by the Japanese military on the continent secured the possibility of the invasion of the Japanese Army of the Soviet territory and the conduct of aggressive operations on a large scale (Ex. 838, 712, 725).

This point was dealt with in detail in our summation and there is no need to repeat it.

The defense ignore not only Japan's military preparations for an attack on the U.S.S.R. stated above,

but also such an important point as the radical change in the correlation of forces in favor of Japan which was expected by Japan in connection with the course of the German-Soviet war and the expected military defeat of the U.S.S.R. (Ex. 830, 801-A, 806, 3700).

Raising the issue of the estimated comparative strength, military power and potential possibilities of Japan and the Soviet Union, the defense now in 1948, almost three years since the end of World War II, express, no doubt, sensible ideas that "It would have been not criminal, but insane for Japan to prepare a war against the Soviet Union . . ." (T. 42,818) Maybe such sensible thoughts are now at last occurring to the accused, too. But can it serve now as justification or mitigation of the guilt of the accused who, as participants in the conspiracy of aggression against the world, prepared and initiated war in the East?

The desire to transform the nations of Asia into colonial possessions led the Japanese aspirants to world domination to work out adventurous plans of aggressive war against the Soviet Union, China and other nations. The military defeat suffered by Japan and Germany in World War II resulted in complete frustration of their aggressive plans.

The plans of Japanese aggressors against the

U.S.S.R. were plans of adventurers aspiring to world domination who did not take into consideration that aggressive plans of any aspirants of that kind were beforehand doomed to failure. But this lack of foresight, as it is known, does not make these plans less dangerous for the cause of peace, and cannot serve as mitigation of the responsibility of the gangsters who prepared those plans and implemented them which resulted in the loss of millions of human lives. The defense could not deny the fact that the Japanese ruling clique provided Germany with secret information on military, economic and political conditions of the U.S.S.R. acting in violation of the Neutrality Pact with the Soviet Union.

The defense state: "It is alleged, and we may even make the large assumption that it has been proved, that Japan committed violations of the pact by the furnishing to Germany of military information from the commencement of the Russo-German war." (T. 42,845)

It would seem that the point is clear. But the defense try to find a legal justification of these actions in the behavior of the other party to the Neutrality Pact -- the Soviet Union. The defense contend that if "the prosecution argument is predicated upon the reasoning that violation of the pact by Japan

had released it from its obligations, this would require proof that the Soviet Union knew of such violation before its being entitled to commit acts in contravention of the pact" (T. 42,845).

The defense should be accurate while stating the prosecution position in order not to mislead the Tribunal. But in this case our position is given in the defense's own and distorted interpretation.

In our summation it is stated: "But, as we have proved already, the Japanese Government concluded the Neutrality Pact with treacherous aims in view without any intention of implementing it. The Japanese Government repeatedly and grossly violated the pact, and because of that the Soviet Government had to denounce the Neutrality Pact as soon as time of denunciation provided for in Article 3 of the pact arrived" (T. 39,748).

The Soviet Government did not commit any acts violating the Neutrality Pact.

The defense refer to only one document, that is, the affidavit of Major General Deane of the U.S. Army in which he speaks about the preparation of joint actions against Japan by the United States, Great Britain and the Soviet Union.

"After June 1944 . . . the Russians provided

until the end of the war some information of Japanese troops movements and dispositions in Manchuria." (T. 23,640)

The prosecution did not deem it necessary to refute this defense document as the date mentioned therein, "after June 1944," belonged to the period when Japan had fully exposed herself as an aggressor, and when the historic mission of the coalition of great powers consisted of the organization of the struggle with the Japanese aggressor and the taking of measures to expedite the end of World War II which cost millions of victims to mankind.

No actions taken up by the Soviet Union in that line are a violation of the Neutrality Pact.

The Tribunal made a basic ruling on that issue that "the Tribunal thinks that evidence of Russia's entry into the war is irrelevant . . ." (T. 23,575)

The defense apparently do not consider this ruling of the Tribunal binding upon them, but we believe that it relieves us of the necessity to enter into a discussion with the defense on this point, for it would mean that we, too, disregard the Tribunal's ruling, and we do not wish to follow the defense's example.

If it is not an admission, then it is at least a semi-admission of facts of the firing at and the sinking of the Soviet ships (the Krechet, the Svirstroy, the Sergey Lazo, the Simeropol, the Perekop, the Maikop, the Kola, the Iemen, the Angarstroy) when the defense in their summation stated:

"As for the sinking of Soviet vessels, if these sinkings were performed, as alleged, by Japanese aircraft and submarines, those acts are not shown to have been committed in accordance with any policy or order of naval authorities or government, nor with their approval or knowledge. It appears, moreover, that in instances when liability was established the Japanese Government did recompense the Soviet Government for its loss by transfer to it of vessels in replacement" (T. 42,847).

We are concerned with the second part of this excerpt not in connection with the question of compensation, which is now not being discussed, but as an admission that in some instances the Japanese Government itself was not able to deny the fact that its agents were guilty of the sinking of the Soviet ships. As regards the orders under which those agents acted, then, as the experience of this trial shows, the accused were not so naive as to preserve such orders.

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However, there can be no doubts that the Japanese High Command, the whole of the governmental clique, and these accused in particular were responsible for those attacks.

The very enumeration of the nine ships which had been fired on and sunk, not being exhaustive, is so impressive that it is impossible to preclude the organizing role played in those acts by the Japanese highest naval authorities and the government.

The circumstances of the firing on and bombing of Soviet ships established by the Tribunal preclude the conjecture that separate units of the Japanese armed forces acted at their own discretion in each instance. It is known that, for instance, the ships "Maikop" and "Perekop" were sunk by large groups of Japanese airplanes in daytime, when the visibility was good and there was no possibility of mistaking the nationality of the ships (Ex. 822, T. 32,570-77; Ex. 823).

So, finally, considering the attacks of the Japanese armed forces on the Soviet ships in connection with the general attitude of the Japanese Government toward Soviet shipping of which the Tribunal is now aware, we quite lawfully and with good reasons regard them not only as a deliberate violation of the Neutrality

Pact, but as downright acts of aggression.

The defense do not deny that the Japanese Government took restrictive and prohibitive measures as regards Soviet shipping in the Far East, but contend that ". . . there was no evidence submitted to contradict the testimony of this witness (FUJITA) indicating that those actions were in accordance with international law" (T. 42,847).

We would like to remind the Tribunal that at the time when the defense introduced the affidavit of FUJITA, this affidavit which abounded in the "authoritative" conclusions of the captain on the questions of international law was admitted with the exception of the parts containing anything that was "in the nature of opinions" (T. 23,503). To avoid compliance with this decision the defense put to the witness some additional leading questions asking him whether the Japanese naval authorities believed that the measures taken by them vis-a-vis Soviet shipping conformed to international agreements. They certainly received an affirmative answer: "They did believe so" (T. 23,515-17).

The defense are not entitled to refer to the contentions of Captain FUJITA to the effect that all measures were taken in conformity with the international law (T. 42,847) as the Tribunal have not

received such a contention, and there is in the case only FUJITA's testimony to the effect that the Japanese naval authorities believed that they acted in accordance with international law. Leaving aside the question of the value of this captain's vouch for the whole navy and the Government of Japan to the Tribunal, we ask: In conformity with what international law did the Japanese naval authorities act in closing straits, establishing compulsory routes, detaining ships and committing pirate attacks on them?

We shall not find the answer to this question in the evidence submitted by the defense.

Instead of giving an answer the defense have asked us to refute the non-existing contention of the witness FUJITA.

In its summation the prosecution has stated in detail what measures of interference with the Soviet navigation were taken by the Japanese Government and has tried to prove specifically that those measures violated the Neutrality Pact of 1941 and the Portsmouth Treaty of 1905 and that these measures were not based on any international rule (T. 37,942-8).

There is no need for us to repeat this evidence or to add anything new.

The defense introduced the affidavit of General Marshall (Ex. 2765-B) during the defense summation on 2 April 1948 after all the evidence had already been closed. This document in their opinion "refutes clearly and convincingly the charge made by the prosecution that the three nations," (Japan, Germany and Italy) "collaborated to dominate the world. It shows that there was lack of cooperation."

The real purpose of the tender of General Marshall's affidavit is seen in the words of defense counsel, Mr. Cunningham, who in support of his application to the Tribunal for permission to file the affidavit referred to ". . . the pressure of the present world events. . ." (T. 46411).

The defense thus made it quite clear that they regard this affidavit as a political document expressing political views and interests of its author which are connected with the present international situation, and count first of all on the political effect of the tender of this affidavit presented in defense of the major Japanese war criminals. However, there is nothing to the document itself which would support the defense's position on this point, in any event such matters are of no

concern to this Tribunal which must consider this document only for its evidentiary character on the issues in this case. It is quite clear from the analysis of this document that it does not in the least prove what the defense desire.

In our submission regardless of which party offered the document and whose signature it bears it should be objectively appraised. General Marshall's affidavit is not entitled to be given any weight in this case. The affidavit is made in such a way that its main theses are of speculative and hypothetical nature and consequently can neither confirm nor refute anything before the International Tribunal whose duty is the exact establishment of facts based on legal evidence, but not on the opinions of individuals no matter how weighty their names are.

The witness asserts that there was no "close" strategic coordination between Germany and Japan, and in support of his opinion advances the contentions which themselves should be proved and as these contentions are indeed unwarranted, unfounded and contradict the facts it means that the basic contention of the witness should fall to the ground too.

Furthermore, the prosecution desires to call to the attention of the court two matters in connection

with this affidavit which clearly reveal that the evidence given is of no assistance to the defense whatsoever. In the first place, it should be noted that General Marshall does not say that there was no cooperation between Germany and Japan. He does say that it was not necessary to have "close" strategic coordination because the objective of dividing the forces of the Allied powers strategically had already been accomplished by the mere fact of Japan's entry into the war. It must be remembered that this method of operation was the result of a special agreement between Germany and Japan. In the second place, however, it should be noted that General Marshall's statement is in part based upon the lack of information which would lead to the opposite conclusion. As a matter of fact, General Marshall's information on this point is significantly less than the information which this Tribunal has. This Tribunal has before it information which was evidently completely unknown to General Marshall in 1946 when he submitted his report to the President of the United States.

Thus, in item (b) of the reply to question 1, the witness says: "'close' coordination should have involved consideration of a Japanese attack on the rear of the USSR." (T. 46778-9).

It means in the opinion of the witness that such a consideration of a Japanese attack on the rear of the USSR did not take place.

However, the facts and documents show that the Japanese Government and the German Government repeatedly and specifically discussed from political and strategic viewpoints problems connected with the Japanese attack on the rear of the USSR.

It is seen from the documents, inter alia, that the Japanese Ambassador in Berlin OSHIMA and the Japanese Minister of Foreign Affairs MATSUOKA were informed about the preparation by Germany for the attack on the USSR, and that MATSUOKA gave assurance that Japan would fight the USSR on the side of Germany. (Ex. 769, 783, 790, 789, 792, 1068, 1075).

After Germany's attack on the USSR, the Imperial Conference of July 2, 1941 reached a decision about a secret preparation for a war against the USSR in order to carry out the attack, when the favorable situation presented itself, connecting that situation with the expected successes of Germany in the war against the USSR. (Ex. 779).

A number of indisputable documents show that that preparation by Japan for a war against the USSR was conducted most intensively, but Japan's attack on

the USSR did not materialize because the Soviet Army having defeated the German aggressors frustrated the plans of the Japanese imperialists. This is described in detail in our General Summation (T. 39902-928).

Besides, is not OSHIMA's testimony that in July-August 1941, he was given an explanation by Ribbentrop and Keitel about the slowing of the pace of German advance on the territory of the Soviet Union a proof of the coordination of actions of Germany and Japan? (Ex. 776)

Does not a telegram from Tokyo to Berlin dated September 30, 1941, prove such a coordination? I quote: "Say that by our present moves southward we do not mean to relax our pressure against the Soviet." (Ex. 802).

Of what if not of the coordination of actions does the telegram sent by Ribbentrop to Tokyo on 15 May 1942 speak in which he advised that Japan should ". . . arrive at a decision to attack Vladivostok, at the very earliest. . . However, this is all based on the promise that Japan is sufficiently strong for an operation of this nature. . . If Japan lacks the necessary strength to successfully undertake such an operation then it would naturally be better that she maintain neutral relations with Soviet

Russia"? (Ex. 807)

It is known that the question of coordination of Germany's and Japan's actions against the USSR was discussed during numerous conversations between OSHIMA and Ribbentrop in 1941, 1942, and 1943. (Ex. 769, 776, 3822-A, 812-A).

The documents show that there existed quite a definite understanding between Germany and Japan that the Kwantung Army,1,000,000 men strong, had as one of its main tasks the containment of the Soviet Army forces in the Far East which could have been used by the Soviet Union in the war against Hitlerite Germany. (Ex. 636, 807, 812-A).

These are the facts which prove the existence of military and political coordination between Germany and Japan as regards the USSR and which refute the contention of the defense witness, Mr. Marshall.

In paragraph "C" of the first answer in his affidavit the witness states that Japan preserved a strict neutrality toward the Soviet ships carrying U. S. Lend-Lease materials to Vladivostok. We do not know on what ground the witness asserts this.

But the whole world as well as the Tribunal knows numerous facts confirming that a number of Soviet ships were attacked and sunk by the Japanese armed

forces, and that the Japanese Government put various serious obstacles in the way of the Soviet shipping in the Far East, and, inter alia, they carried out wholesale, unlawful detentions of ships, closed the straits and established compulsory routes which were inconvenient and dangerous. (T. 39942-953).

It is quite incomprehensible how importance can be attached to the foregoing statement of the witness about the strict neutrality of Japn with regard to the Soviet ships in the light of the facts to which I referred above.

The aforesaid statement of the witness in paragraph "C" of the affidavit can only be accounted for by the affiant not being aware of all these facts.

All the facts referred to by the prosecution quite convincingly show that neutrality was systematically and grossly violated by Japan.

In paragraph "e" the witness states that no evidence of cooperation on intelligence and operational information has come to his attention. (T. 46780). This may be interpreted as lack of such a coordination. We invite the Tribunal's attention to the fact that, as may be seen from the documents, Japan systematically provided Germany with secret intelligence information about military, economic and political conditions of

the USSR (Ex. 771, 836, 811, 3858; T. 39939-42). This fact has not been contested even by the defense (T. 42845).

In paragraph "f" of his first answer the witnsss says that if there had been close coordination between Japan and Germany, they would have flanked the USSR on the south by coordinated operations of Japan in India and of Germany in the Egyptian area. (T. 46780).

This answer is of a purely speculative nature. Without engaging in detailed analysis of the answer we confine ourselves only to pointing out that the desire alone to flank the USSR on thesouth or on any other side was insufficient, it would require real forces which at that time as far as Hitlerite Germany was concerned were bogged in the battle with the Soviet Union at the front extending from Murmansk to the Caucasus and were being annihilated by the Soviet Army, and, as far as Japan was concerned, were engaged in the Pacific and in China and were preparing to attack the USSR from the Manchurian and Korean military bases, and that was more important for Japan than the "flanking of the USSR on the south."

In any event the statement made by the witness in paragraph "f" of his answer cannot serve as an

indication of lack of coordination between Germany and Japan.

Thus, the contentions propounded by the witness in support of the main conclusion are themselves absolutely groundless and contradict the facts. Consequently, the witness's conclusion about a lack of "close" coordination to which the defense is eager to give a broader interpretation and regard it as a lack of cooperation must be viewed in light of General Marshall's statement about his understanding of "close" cooperation and in light of the evidence which the Tribunal has and which General Marshall did not and could not have.

In our reply we have dwelt upon the main points raised by the prosecution. We have not touched upon very important issues, such as the subversive activities of the Japanese imperialists against the USSR or the organizations of sabotage and subversive acts on the Chinese Eastern Railroad because the defense in its General Summation passed them over in silence.

Thus, we have reasons to contend that the defense are unable to contrast prosecution evidence on these issues with something material.

Thus, we have all reasons to maintain that

the defense's argument stated in its summations could not shake any of the prosecution's contentions.

THE PRESIDENT: Judge Hsiang.

JUDGE HSIANG: If it please the Tribunal, I will present the prosecution's reply to the defense summation on behalf of the accused DOHIHARA.

The essence of DOHIHARA's defense is that he was merely a subordinate officer acting at all times under the command of his superior officers, carrying out plans which he had no part in formulating, that he neither had nor exercised political strength, and he had no part in the formulation of any policy to which Japan was committed. We shall not repeat the facts and arguments set ut in the prosecution summation, which we respectfully subrit showed DOHIHARA to have been one of the original conspirators, frequently putting into effect his bold designs without authorization from the Central Government by which they were belatedly and sometimes begrudgingly accepted as fait accompli; but we shall confine this reply to certain specific instances in which the defense, under what they term "analyzing the evidence," seek to minimize the importance of DOHIHARA's action.

I. DOHIHARA's report on himself.

The defense seek to lessen the value of the official report made by DOHIHARA (exhibit 3177-A, T. 28621, 28618-9, 28657) as Chief of the Mukden Special Service Organ to the War Ministry which contains the statement "In South China, to hear the names of Major Generals DOHIHARA and ITAGAKI is something like 'mentioning a tiger and the people turn pale,'" by stating that it is based on newspaper comment, relying upon the testimony of AIZAWA (T. 28618-19). It is pertinent to state that this document (1) bears the seal of DOHIHARA, (2) is marked "very secret," and (3) was included by DOHIHARA in his report to the War Minister. The defense do not mention that their witness AIZAWA also testified "DOHIHARA's name constantly appeared in the newspapers. Furthermore, newspaper comments frequently report to the effect that DOHIHARA was engaged in conspiracies and various plots." (T. 28619). As to the probative value of this report, the statement in the summation that "Even the President of the Tribunal questioned its value" needs no further comment than the action of the Tribunal in admitting it in evidence after the question of its probative value had been argued. (T. 28619-20).

II. DOHIHARA and the NAKAMURA Case.

The defense seek to minimize the importance of DOHIHARA's trip to Shanghai, Hankow, Peiping, and Tientsin before going to Mukden in August 1931 to become the head of the Japanese Special Service Department (N-2, pp. 11-13, T. 43751-3) and charge the prosecution with trying to impute to him other duties and purposes beyond the investigation of the NAKAMURA case. They also charge that the interrogator "always insisted on attempting to put into the mouth of DOHIHARA things he did not say or mean." (N-2, p. 11, T. 43751). The record in this case clearly and directly denies each of these claims of the defense. The very first questions and answers in the interrogation of DOHIHARA on 11 January 1946 were as follows:

"Q What year was it when you first went to Manchuria for the first time?

"A August 15, 1931. I entered Manchuria with Japanese forces as a colonel and as Commander or Head of the Japanese Special Service Department.

"Q What were your duties in that capacity, briefly?

"A First of all, to gain intelligence of the Chinese and as a liaison between the Chinese forces

and the Japanese forces -- but this was before the war." (T. 15713).

Again, in his interrogation on 5 February 1946 DOHIHARA stated that the investigation of the murder of Captain NAKAHURA was not the only purpose of his mission and that he had other duties. The interrogation continued (T. 15725).

"Q What was those other duties?

"A The other two duties were investigation and liaison with Chinese forces.

"Q What does investigation mean?

"A The investigation consisted of determining the strength of Chinese forces, their training, their communication and the condition in the civilian population."

The defense attempted to justify the claim of DOHIHARA that the Chinese were not sincere in their efforts to settle the NAKAHURA case by quoting only the last portion of a sentence from the Lytton report, viz: ". . . it would seem that diplomatic negotiations for attaining a solution of the NAKAHURA case were actually progressing favorably up to the night of September 18." (N-2, p. 14, T. 43754; Ex. 57, p. 65, para. 3). Yet they fail to quote the first part of this sentence which shows that the Chinese admitted

responsibility and desired prompt settlement. It reads: "Since the Chinese authorities admitted to Japan consular officials in Mukden, in a formal conference held on the afternoon of September 18, that Chinese soldiers were responsible for the death of Captain NAKAMURA, expressing also a desire to secure a settlement of the case diplomatically without delay." (Ex. 57, p. 65). In spite of the facts as recorded in the Lytton Report (Ex. 57, p. 64-5) that the efforts of the Chinese to secure a settlement of the NAKAMURA case included (1) the ordering of a second inquiry, (2) the dispatch by Marshall Chang Hsueh-liang of SHIBAYAMA and Tang Er-ho as special emissaries to Tokyo to seek a basis for settlement by conference with SHIDEHARA, MINAMI, and other high military officials, (3) the decision to handle the case "in accordance with the wish of the Japanese authorities," by Governor Tsang and the Manchurian authorities and not by the Foreign Office at Nanking, (4) the arrest, imprisonment, and arrangements for the immediate trial of Commander Kuan charged with the responsibility for the murder of NAKAMURA, all of which must have been known to DOHIHARA since he was summoned to Tokyo to report the progress of the case, the Lytton Report affirms "Numerous statements of Japanese military

officers, however, especially thos. of Colonel K. DOHIHARA continued to question the sincerity of the Chinese efforts to arrive at a satisfactory solution of the NAKAMURA Case. . ." (Ex. 57, p. 65), and that DOHIHARA was reported by the Japanese press". . . as the advocate of the solution of all pending issues, if necessary by force and as soon as possible."

III. DOHIHARA and the Lytton Report.

The fact that the Chinese who fled from Mukden during the fighting returned to their homes after the fighting ceased is hardly, as claimed by the defense, the highest type of proof that ". . . they had implicit and absolute confidence in the man the enemy selected to restore order and peace." (N-2, p. 26, T. 43763). In answer to the claim of the defense that the Lytton Commission highly praised the activities of DOHIHARA and that Lord Lytton expressed great respect and admiration for DOHIHARA (N-2, p. 26, T. 43768) it is pertinent to point out that in the Lytton Report the name of DOHIHARA appears at least five times. (1) He continued to question the sincerity of the Chinese (Ex. 57, p. 65), (2) advocated the use of force (Ex. 57, p. 66), (3) Pu-Yi went to Manchuria after a talk with DOHIHARA (Ex. 57, p. 77), (4) DOHIHARA was sent to Harbin to head the Special

Service Organ (Ex. 57, p. 79) and (5) DOHIHARA was installed as the Mayor of Mukden (Ex. 57, p. 88). In the course of his interview with DOHIHARA, Lord Lytton remarked: "We understand the General . . . has played a very prominent part in recent events." (Ex. 3180-A, p. 2; T. 28669). In view of the decision of the Lytton Commission as to the purpose and effect of Japan's action in China, we respectfully submit that no further comment is necessary concerning their estimate of DOHIHARA, who "played a very important part" in these activities.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1045, a recess was taken until 1100, after which the proceedings were resumed as follows:)

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Judge Hsiang.

JUDGE HSIANG: IV. Abduction of Pu-Yi.

The defense devote almost a quarter of their summation in an attempt to minimize the actions of DOHIHARA in connection with the steps taken and means used to get Pu-Yi out of Tientsin and into Manchuria (N-2, pp. 28-52, T. 43,771-43,793). The prosecution has set out the facts which support its position both in the General Summation (D-61 to D-66, T. 39,144-39,153) and in the DOHIHARA Summation (BB-14 - BB-34, T. 40,625-40,640). The defense confines itself to small points and at no time denies the gravamen of the prosecution's evidence which we respectfully submit clearly established that DOHIHARA was the prime conspirator both in the making and the execution of the plans to get Pu-Yi from Tientsin to Manchuria. The devious methods used by DOHIHARA included both inducements and threats. The defense seek to enlarge upon the role played by KASHII, the local commander of the Japanese troops in Tientsin, in compelling Pu-Yi to go to Port Arthur (N-2, p. 32, T. 43,779). The part taken by KASHII was referred to

by the prosecution in its General Summation (D-62, T. 39,146). It does not in any wise lessen the responsibility of DOHIHARA as the moving spirit in this plot that he entrusted to the local Japanese commander certain portions of the overall plan.

The attempt of the defense to belittle the telegrams sent by Consul General KUWASHIMA in Tientsin to Foreign Minister SHIDEHARA in Tokyo (Ex. 287, 289, 290, 291, 292, 293, 295, 296, 300, and 304) will be dealt with in another part of the prosecution's reply to the defense Summation. These official reports to the Japanese Foreign Minister speak for themselves and no amount of "analyzing" by the defense can weaken their effectiveness in revealing DOHIHARA as the prime instigator to get Pu-Yi out of Tientsin and into Manchuria to become head of the government which DOHIHARA and his co-conspirators were planning to establish in Manchuria. The defense overlooked the fact that all the reports, regardless of their source, agree on one essential point -- it was DOHIHARA who was in Tientsin threatening Pu-Yi and using every means to get Pu-Yi to go to Manchuria.

The defense deny that DOHIHARA was warned by his government that the attempt to create an independent state in Manchuria would raise the question

of the violation of the Nine-Power Pact and insist that the telegram from SHIDEHARA to KUWASHIMA dated 1 November 1931 (Ex. 286, T. 4354) does not mention the name of DOHIHARA. That DOHIHARA's name is not mentioned in this telegram is correct, but that fact does not preclude this from being a warning against the action which DOHIHARA was then taking. KUWASHIMA in this telegram is urged to do his utmost "to stop the abduction plan" (T. 4358). KUWASHIMA in his various telegrams to SHIDEHARA had mentioned no other name than that of DOHIHARA as the would-be perpetrator of the abduction plan. In a subsequent telegram (Ex. 289; T. 4363) KUWASHIMA reported to SHIDEHARA that in accordance with his previous instructions (referring by number to the above mentioned telegram of 1 November 1931, Ex. 286, T. 4354 which contained the instructions to stop the abduction plan) "we tried every means to prevent DOHIHARA but he was insisting on the following points..." and outlined the plan of DOHIHARA to get Pu-Yi from Tientsin to Manchuria which was so designed as to make it appear that Japan had no part in the plot. These five points are the answers of DOHIHARA to the SHIDEHARA warning that Japan's sponsorship of the new government in Manchuria would raise the question of violation of the Nine Power

~~Pact. The defense would minimize the value of these~~ five points and dismiss these fundamental parts of DOHIHARA's scheme with the statement "which we do not consider important and therefore will not discuss at this time." (N-2, p. 44, T. 43,787)

After this summary dismissal, the defense does recite that one of these points was concerned with "the Emperor's apparent resolve to go to Manchuria at the risk of his life." (N-2, p. 44, T. 43,787, T. 4365) While this portion of the telegram as amended by the Language Arbitration Board actually reads: "so, if it becomes clear that the Emperor has the determination to risk his life and go to Manchuria, and that the ways and means therefore are found, it will be possible to promote Chinese public opinion and cause the Chinese to make public statement of welcoming the Emperor so as to make the matter appear as a Chinese movement on the surface." (Ex. 289, T. 4365) The omission of the word "if" in the defense summation changes what was DOHIHARA's supposition into the "Emperor's resolution to go to Manchuria."

In his interrogation, DOHIHARA admitted that he knew that when the Kwantung Army was planning to set up an independent state called Manchukuo it constitute a violation of the Nine Power Pact, (T. 15,729-30).

In spite of this, DOHIHARA boldly asserted that "it would be outrageous for the present government to take the attitude of preventing it" and threatened that if the government did take such a stand "the Kwantung Army might separate from the Government, and who knows what action it might take? In Japan proper too, besides the assassination plotters who are now under confinement, some grave accident may occur, he feared." ("The assassination plotters who are now under confinement" obviously refer to those individuals in the October Incident.) (Ex. 290, T. 4367-8)

Consul General ARAKAWA at Yinkow in his telegram to Foreign Minister SHIDEHARA on 13 November 1931 (Ex. 294, T. 4379) reported that "Colonel DOHIHARA headed the plot in the escape of the Emperor from Tientsin." He gave as his authority for the statement the Captain of the ship on which Pu-Yi traveled. Pu-Yi was taken in a motor car stealthily from the concession and brought to the pier. The party was guarded by a force armed with machine guns.

DOHIHARA's intrigue is further shown by the confidential report made by a representative of the Army in Tientsin to KUWASHIMA on 13 November 1931. (Ex. 295, T. 4381) giving the details of the manner in which Pu-Yi was got out of Tientsin by the army

and stating that "the army will deny all connection with it and think they will escape discovery, but if it is discovered they will say that it is for the reason of the former Emperor's plan, i.e., 'because he is so fond of Manchuria and because there was a bombing affair recently, feeling that his life was in danger, he started by himself to realize his plan on November 8. Finding a good opportunity, he fled from the Japanese concession (at Tientsin) and after several days, while his movements were unknown, he appeared in Manchuria" -- to this effect the army proposes to publish its communique..."

The fact that DOHIHARA did not accompany Pu-Yi on the trip does not lessen his part in the plot and tends only to incriminate him further in that the evidence shows that his continued stay in Tientsin brought about another riot on 26 November 1931 (Ex. 57, page 56; Ex. 300, T. 4397).

"Headquarters of the Iron Blood Group, Tientsin Branch of the Chinese Communist Party" was but a name used by the terrorists (Ex. 296, T. 4384-5). KUWASHIMA reported to SHIDEHARA that DOHIHARA was associated with such subversive organizations as "Tsing-Pang and the rogues of the city" (T. 4394).

DOHIHARA was primarily interested in getting

a puppet to head a puppet government. To accomplish his purpose, he used both threats and inducements. It is the action and the purpose of DOHIHARA with which we are concerned. The means by which he accomplished his purpose are not of first importance. He planned to get Pu-Yi out of Tientsin in order that he might become the head of a new government to be established in Manchuria. DOHIHARA accomplished his purpose.

V. DOHIHARA and the Opium Traffic.

The prosecution in its summation stated concisely in three paragraphs (BB-38-40) DOHIHARA's connection with and control of the opium traffic in Southern Manchuria. The defense devote some seventeen pages (N-2, pp. 52-68, T. 43,793-43,810) in an attempt to deny or play down DOHIHARA's connection with and responsibility for the opium traffic. They do not deny the opening of 600 opium shops in Mukden and 150 outside of Mukden (Ex. 377, T. 4,691) or that while DOHIHARA was mayor of Mukden the municipal administration planned the monopolization of opium for the purpose of raising funds--" "...the materializatic of a part of the plan of the army marked Secret No. 781..." (Ex. 3740, T. 37,340) They seek to minimize this by stating "the control of opium was in a planning

period and there were actually no operations at that time." (N-2, p. 54, T. 43,795). The defense do not deny that opium traffic was under the control of the Special Service Organ until it was transferred to the Opium Control Bureau. The time of this transfer was in 1935 (T. 15,856; T. 15,922) Prior to 1935 the Opium Control Board was, according to TANAKA, "an organization in name and not in fact." (T. 15,927-8) Even the defense witness NAMBA does not confirm their claim that the transfer of control of opium to the Monopoly Bureau occurred in 1933 for he stated: "To quote a hackneyed expression, the form was set up but it had nobody in it. (T. 20,309-10) The defense discuss in extenso the conflicting statements as to the dates that DOHIHARA returned to Mukden as head of the Special Service Organization.[a] But the exact date is not material since all of them are in advance of the

a. According to the defense, there are three conflicting dates as to when DOHIHARA returned to Mukden. (1) TANAKA - December 1934 (T. 15,923); (2) DOHIHARA July 1934, (T. 15,715); (3) AISAWA - Dec. 1933, (T. 28,603). The prosecution submits that there is a fourth one - October 1933, taken from the Cabinet Secretariat Personnel Record (Ex. 104, T. 696), which we respectfully submit is official and correct. DOHIHARA stated in his interrogation that he was the head of the Special Service Organization at Harbin from the end of November 1931 until March 1932 (Ex. 2190-A, T. 15,715).

time when the actual transfer of opium control from the Special Service Organs to the new body became effective.

TANAKA testified:

"The establishing of the Opium Control Board was completed in the spring of 1935. After that it became necessary for opium retailers to abide by the regulations and permission issued by the Special Service Department, and without such permission they were not permitted to engage in this traffic, and so therefore General MINAMI, then the Commander-in-Chief of the Kwantung Army, ITAGAKI, Chief of Staff, and TOJO, later Chief of Staff of the Kwantung Army, took this authority away from the Special Service Department." (T. 15,922)

MINAMI, who was appointed commander in chief of the Kwantung Army in December 1934, testified that one of the reasons for the abolition by him of the Special Service Department was that they were running the opium traffic for their personal benefit. (T. 19,976) This fixes the time of the transfer of the opium control as subsequent to December 1934. We respectfully submit that the evidence clearly establishes that DOHIHARA was Chief of the Special Service Organ in Mukden before and at the time of the transfer of opium control from that organ to the Opium Control Board.

VI. DOHIHARA in Northern Manchuria.

The defense charge that Powell's testimony that General Ma, as the result of negotiations with DOHIHARA accepted the position of Minister of War in the puppet government is rank hearsay. Powell testified that he went to North Manchuria for the specific purpose of investigating the situation and that he interviewed General Ma on two occasions. (T. 32,320) Powell testified: ". . . General Ma, as a result of the negotiations with DOHIHARA accepted the position of Minister of War in the Chang Chun Government, the puppet government which the Japanese had set up at the time of Chang Chun . . . the negotiations leading

to these developments were conducted from General DOHIHARA's office which he established in the city of Harbin." (T. 3232) After giving the results of his own investigation, Powell mentioned as "the final chapter in that episode" a circular telegram sent by General Ma to Generalissimo Chiang, Kai-Shek (T. 3233)

VIII. Inner Mongolia Autonomy.

The defense claim that there was no such thing as the Ching-DOHIHARA Agreement (N-2, pp. 21-72, T. 43,817) and that "the whole episode (North Hopei Affair) had nothing to do with establishing or attempting to establish autonomy in Inner Mongolia." (N-2, p. 72, T. 43,818) They appear to be confused in their facts and in their geography. General Ching testified that "It was not an agreement out of the wish of the Chinese people." (T. 2340). It constituted demands made by DOHIHARA and reluctantly acceded to by General Ching; only the Japanese refer to it as the "Ching-DOHIHARA Agreement." It was never formally recognized as an agreement by the Chinese Government because it was brought about entirely by the coercion and threats of DOHIHARA. (T. 2340)

The North Hopei Affair mentioned by the

defense (N-2, p. 72, T. 43,817) apparently refers to the North Chahar (sometimes called the Changpei) Affair. We respectfully submit that there is no inconsistency in the testimony of General Ching on this subject. He stated in orderly fashion the facts concerning the North Chahar Affair and how a settlement was effected under the threats and coercion of DOHIHARA. (T. 2327 - 40) Therefore, there is nothing in the record to justify the statement by the defense "in reading the record one might be confused and believe that there were two Chings." (N-2, p. 72, T. 43,817) It is the defense which is confused. Chahar Province is a part of what is commonly called Inner Mongolia. As the result of the demands made by DOHIHARA in the settlement of the North Chahar Incident, Chinese troops were compelled to withdraw from certain districts North of Changpei and activities of the Kuomintang party were banned in this province. (T. 2313) This laid the foundation for the creation of autonomous rule in that part of Inner Mongolia.

WAKASUGI, Councillor to the Japanese Embassy in Peiping, reported to Foreign Minister HIROTA on 2 October 1935 giving his observations on the recent trip to see the Governor of Chahar Province, and Prince Te stated "his mission was no doubt to promote

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the Inner-Mongolian self-government." (T. 2284)

VIII. "Autonomous Movements" in North China.

The defense contend that the Japanese had nothing to do with the East Hopei Regime alleging that the Tribunal "could almost take judicial knowledge of that fact." (N-2, p. 76, T. 43,821) This quite overlooks the testimony of TANAKA:

"Major General DOHIHARA bent his efforts toward the--- exerted his efforts on behalf of the Autonomous Movement with the intentions of the Kwantung Army and the Japanese Army in North China in mind." (T. 2028)

And his further testimony:

"Later, shortly afterwards, however, as a result of the great efforts made by Major General DOHIHARA, two regimes were established in North China in November, 1935: namely, Hopeh and Chahar. One of the regimes was the East Hopeh Anti-Communist Autonomous Regime which covered a demilitarized zone south of the Great Wall." (T. 2029)

The defense aver that no citation of authority except a newspaper clipping supports the prosecution's charge that DOHIHARA issued an ultimatum on 19 November 1935 to the North China authorities threatening to send Japanese forces into Hopei and Shantung if

autonomy for North China was not proclaimed. (N-2, p. 80, T. 43,825) We respectfully submit that this statement is not sustained by the record.

KUWASHIMA at first denied any knowledge of DOHIHARA's efforts to force autonomy on North China in November 1935. (T. 29,536-7) Evidence was introduced in his cross-examination showing that Japanese diplomats in England and in China were informing the Central Government of the reports which they were receiving of the part taken by the Japanese military authorities in the independence movement in North China. (Exhibit 3242, T. 29,539; Exhibit 3242-A, T. 29,542) Confronted with reports from many sources concerning the activities of DOHIHARA in connection with the autonomous movement, KUWASHIMA finally admitted that DOHIHARA's ultimatum to the North China authorities as reported in the "Evening Post" of 20 November 1935 was one of the ultimatums to which he referred in his affidavit. (T. 29,545) [a]

IX. DOHIHARA in the Peiping-Hankow Drive.

The defense attempt to absolve DOHIHARA from the liability for the killing of civilians by the

a. It is interesting to note that the defense invites the Tribunal to read pages 29,539 to 29,541 of the Transcript (N-2, p.81, T.43,826) but did not extend the invitation to include p. 29,545, where KUWAJIMA made the important admission about the ultimatum.

Japanese forces under his command during the Peiping-Hankow Drive in December 1937 (Exhibit 348, T. 4646) by claiming, (1) that the troops who engaged in this campaign were not under his command, and (2) that since those killed were guerrillas the Japanese troops had the right to kill them. (N-2, pp. 92-95, T. 43,838-40) That DOHIHARA was in command of the 14th Division in China from August 1937 until June 1938 and took part in the Peiping-Hankow Drive is shown by his own statement. (Exhibit 2190-A, T. 15,715) The argument that DOHIHARA's troops had the legal right to kill civilians (N-2, p. 94, T. 43,839-40) who were from the evidence "suspected to be guerrillas" (Exhibit 348, T. 4646), is so thoroughly unsound that we do not deem it deserving of reply.

X. Defense Challenges.

As to the sundry challenges flaunted by the defense,[b] we respectfully refer to our summation (T. 40,617 - 40,661) and the facts from the record recited therein, and submit that these facts establish beyond all reasonable doubt the guilt of the defendant DOHIHARA on all the charges against him made in the Indictment.

b. "Challenge the Prosecution" (N-2, pp. 70, 108, T. 43,818 - 43,854; "We defy the Prosecution" (N-2, p. 85, 93, T. 43,829, 43,838)

THE PRESIDENT: Colonel Warren.

MR. WARREN: If the Tribunal please, there are certain passages in the prosecution's reply to the defense summation on the defendant DOHIHARA which we consider highly objectionable. However, inasmuch as we know that the Tribunal is checking with extreme care each reference to the record, we will not at this time force our objections, but merely at the present time enter our objection and leave the matter entirely in the hands of the Tribunal.

THE PRESIDENT: The Court's Judicial Committee is correcting or checking carefully every statement in every summation, prosecution and defense.

JUDGE HSIANG: I will continue to present the prosecution's reply to the defense summation in the case of ITAGAKI..

ITAGAKI

Since most of the positions taken by the defense in the ITAGAKI Summation had been anticipated and dealt with by the prosecution in its Summation (HH-1 to HH-55; T. 40,984 - 41,023), we do not deem it necessary to make any detailed answer and will call to the attention of the Tribunal at this point only a few of the unsound arguments and statements of fact not supported by the evidence.

1. ITAGAKI and the Mukden Incident.

The defense, relying upon the evidence of ISHIHARA (Ex. 2584, T. 22,116), allege that diplomatic negotiations between Japan and China had failed on 18 September 1931, "despite the cooperative policy of Japan", that all the Japanese Army came to the conclusion that a collision of arms was now inevitable, and the defense then state in their Summation (N-8, p. 13, T. 45,120): "It is clear that a collision of arms provoked by the Chinese Army was inevitable." This is directly contrary to the findings of the Lytton Report, which stated: "Since the Chinese authorities admitted to Japanese consular officials in Mukden in a formal conference held on the afternoon of September 18 that Chinese soldiers were responsible for the death of Captain NAKAMURA, expressing also a desire to secure a settlement of the case diplomatically without delay, it would seem that diplomatic negotiations for attaining a solution of the NAKAMURA case were actually progressing favorably up to the night of September 18." (Ex. 57, p. 65.)

The defense in their attempt to absolve ITAGAKI from liability for approving the attack by the Japanese forces on the Chinese state: "Although ITAGAKI accepted what Lt. Col. SHIMADO and Col. HIRATA had informed the Special Service Section the action was taken on the responsibility of each unit and not on his order." (N-8, p. 27, T. 45,135). The defense cite no authority for this statement. Even the witnesses for the defense do not support this statement for HIRATA testified in his affidavit: ". . . I therefore asked ITAGAKI to approve of my operational plan stating, 'It is natural that if we rout Chang Hsueh-liang's troops within the outer walls, we should rush by momentum the west wall of the inner castle. To occupy and hold the west wall tonight will be most advantageous for our attack tomorrow. I request your approval of our occupying the enemy's positions as far as the west wall.' He gave his approval." (Ex. 2404, T. 19,288). On cross-examination this witness became evasive and even stated that he did not believe that Staff Officer ITAGAKI had authority to give orders for the attack (T. 19,308). He was recalled to the stand and asked by the President of the Tribunal "If ITAGAKI had no authority to give you orders, why

did you request his approval of your plan of attack?" He continued to evade the questions asked on behalf of the Tribunal until the President finally stated (T. 19,313) "We can form our own conclusions."

Defense witness TAKEDA testified (Ex. 2405, T. 19,328) that ITAGAKI, a Senior Staff Officer of the Army, was in Mukden on the 18th of September and that "he (ITAGAKI) gave necessary instructions to Colonel HIRATA, the Commander of the 29th Regiment of Infantry and Commander of the Garrison at Mukden and Lieutenant Colonel SHIMAMOTO, the Commander of the Second Battalion of the Independent Garrison and agreed with their determination to attack the barracks at Mukden and Peitaiyant." Even ITAGAKI testified:

"In the capacity of a staff officer who happened to be present there, I accepted their determinations and took steps to report to the Commander-in-Chief that the Independence Garrison would fight it out with the enemy at Peitaying and the 29th Regiment against the enemy within Mukden." (T. 30,264)

The primary reason assigned by the defense for ITAGAKI's failure to heed the earnest and persistent request of Consul-General HAYASHI to cease the fighting in view of the announced Chinese policy

of non-resistance was that "It could not be known whether it might not turn out to be the enemy's habitual trick in order that they might gain time to rearrange the situation and bring about Japanese army delay and unalertness." (N-8, p. 36, T. 45,144-5.) The findings of the Lytton Commission setting forth the totally unprepared condition of the Chinese forces on that night (Ex. 57, pp. 68-70) and the almost total absence of resistance on the part of Chinese forces constitute a complete denial of the claim of the defense. The Commission found:

"The Chinese, in accordance with the instructions referred to on page 69 (non-resistance), had no plan of attacking the Japanese troops, or of endangering the lives or property of Japanese nationals at this particular time or place. They made no concerted or authorized attack on the Japanese forces and were surprised by the Japanese attack and subsequent operations." (Ex. 57, p. 71).

MORISHIMA testified that when HAYASHI sought to persuade ITAGAKI to cease fighting, ITAGAKI replied that "General orders had been issued to the Army and the Army would proceed as planned." (T. 3022) Despite the request of the Japanese Consul-General not only did the military operations in Mukden

proceed "as planned" but all of the Japanese forces in Manchuria and some of those in Korea were brought into action almost simultaneously on the night of 18 September over the whole area of the South Manchurian Railway from Changchun to Port Arthur. The Chinese troops at Antung, Yingkow, Liaoyang, and other smaller towns were overcome and disarmed without resistance. (Ex. 57, p. 71) ITAGAKI's evasive answers to the questions asked him on behalf of the Tribunal as to whether any special orders were given to the troops stationed at Changchun, Antung and Fushun (T. 30,523-6) find their explanation in the testimony of HONJO who wrote (Ex. 2043, T. 19,258). "Among forces under my control, however, there were some which started action before the arrival of my orders and there were some that started attacks previous to the enemy's offensive." ITAGAKI, the senior staff officer in Mukden, on the fateful night of 18 September 1931 approved the attack by the Japanese forces and thereafter reported his action to HONJO. (Ex. 2404, T. 19,288, T. 30,264.) It was ITAGAKI who lit the fuse for the Mukden Incident.

2. ITAGAKI and the "Independence" Movement in Manchuria.

The defense citing ITAGAKI's testimony

(N-8, pp. 55-56, T. 45,160-1) assert that ITAGAKI in November and December 1931 interviewed the political leaders of the various districts -- "Some of these men were governors of provinces, some others were commanders of armies, all of them being men of real power among the people, or having responsibility for the people," (N-8, p. 56, T. 45,161), and that "Their common and earnest desire was to take active steps to establish an independent state." (N-8, p. 55, T. 45,161) ITAGAKI named six so-called leaders of the independence movement. We shall briefly summarize a few pertinent facts appearing from the Record as to each of these:

(1) Chang Ching-hui was the then administrator of the Special District of Harbin. He owed his escape from the hands of the patriotic Chinese to the Japanese forces who later occupied Harbin (Ex. 57, pp. 90-91)

(2) Ma Chan-shan was the Governor of Heilungkiang Province whom the Japanese, acting through the accused DOHIHARA, according to the witness Powell, bribed with a million dollars in gold bars, and who was persuaded to accept the position of War Minister in the Puppet Government. (T. 3232-4)

(3) Hsi Hsia was acting Governor of Kirin Province at the time of the Manchurian Incident. He was invited by the Japanese commander, Major General TAMON, to assume the chairmanship of the Provincial Government. Following this, he summoned the various government organizations and public associations to a meeting on 25 September 1931 which was for the purpose of establishing a new provincial government. (Ex. 57, p. 90)

(4) Hsieh Chieh-shih was the man who was closely associated with Chang Hai-peng in the campaign to capture Tsitsihar, an operation undertaken at the instigation of the Japanese who supplied him with money and rifles. This was reported to the Japanese Foreign Office by Consul General HAYASHI at Mukden. (Ex. 2407, T. 37,324-5)

(5) Tsang Shih-yi was at the time head of the Liaoning Provincial Government. He was approached by the Japanese and asked to form a new provincial government, independent of the Chinese Central Government. When he refused this request of the Japanese, he was arrested. He was later released to be installed as Governor of Fengtien Province. (Ex. 57, pp. 89-90).

(6) Yuan Chin-kai, a former provincial governor, was approached by the Japanese to help in the establishment of an independent government after Tsang Shih-yi had refused. He later disclaimed any intention of declaring independence and was replaced by Tsang Shih-yi when the latter was released from his confinement and installed as Governor of Fengtien Province (Ex. 57, pp. 89-90). On 7 November 1931, Consul-General HAYASHI in a telegram to Foreign Minister SHIDEHARA stated:

"As the result of pressure being brought upon Yuan Chin-kai by the Army Headquarters on the night of the 6th, in the morning of the 7th the Local Peace Preservation Committee held an executives' meeting and decided to add to the decree on acting for the regime the words that it would sever relations with the old regime of Chang Hsueh-liang and the National Government as required by the Army, and this is to be published on the 8th." (Ex. 3791-I, T. 33,623.)

It was, according to ITAGAKI, primarily on the strength of his conference with these six men whom we have just mentioned that ITAGAKI went to Tokyo in January 1932 and reported as follows:

"That the general tendency of Manchuria was

toward an independent State. After having assiduously sounded the prominent authoritative persons and men of real worth in the outside of official circles, I could affirm that they were all earnestly advocating the creating of an independent State, and that the general public, too, were against, not only the return of Chang Hsueh-liang's regime to Manchuria, but also against the advance of Kuomintang Government to Manchuria." (T. 30,278-9)

We respectfully submit that ITAGAKI was a prime mover in the so-called independence movement in Manchuria.

3. War Minister -- Attitude Toward China.

The defense stress that ITAGAKI as War Minister adopted the policy:

"As to China, further efforts should be made to suspend our armed advancement, evacuate some part of the armed forces, stabilize the occupation zones, and at the same time, bring about a peaceful settlement with the Chiang Regime." (N-8, pp. 108-109, T. 45,209) (Ex. 3316, T. 30,330).

That ITAGAKI's actions did not conform to his expressed purpose is fully disclosed by the widespread military operations which continued throughout China and the number of important cities

captured and provinces over-run during the time he was War Minister from 3 June 1938 until 30 August 1939. (Ex. 254, T. 3430-1). As to his alleged desire to bring about a peaceful settlement with the "Chiang Regime," the Five Ministers' Conference in which he took a prominent part decided on 8 July 1938 that the retirement of Chiang Kai-shek was a condition precedent to any settlement with the Chinese Government and that Japan would utilize and control the anti-Chiang Kai-shek element in China for the purpose of establishing "in our enemy's midst" an anti-Chiang Kai-shek Government. (Ex. 3457, T. 37,352-6). The Five Ministers' Conference further decided on 15 July 1938 upon a "Guiding Policy for the Establishment of the New Central Government in China," the essence of which was "though the establishment of the new Central Government of China shall be undertaken mainly by the Chinese, it shall be internally assisted by Japan." (Ex. 3457, T. 37,357).

It was on orders issued by War Minister ITAGAKI that KAGESA went to Shanghai on 19 November 1938 to contact Wang Ching Wei's associates there. (T. 24,032) Shortly thereafter Wang Ching Wei "escaped" from Chungking to Hanoi from whence he

was later brought by KAGESA to Shanghai. (Ex. 2721-B to H, T. 24,151-62) On 6 June 1939 after the visit of Wang Ching-wei to Japan, the Five Ministers' Conference in outlining the policy for "the new Central Government in China" stated: "Positive and internal aid necessary for this movement shall be given from the side of Japan." (Ex. 3742, T. 37,387-8)

THE PRESIDENT: Mr. Horwitz.

MR. HORWITZ: May it please the Tribunal:

1. In its final reply the prosecution will not follow the traditional or orthodox pattern of dissecting and analyzing the final arguments of the defense in great detail. Such an approach would serve no useful purpose in this proceeding. To point out specifically item by item each misstatement of fact, each misquotation, each misleading summation of evidence, each untenable inference and to refute and answer them one by one would be of value to this Tribunal only if the contentions sought to be established through their use presented a valid defense to any issue now before the Tribunal. But they do not accomplish this purpose. If we should assume for purposes of argument that each of the errors, whether of fact or of inference, were true and valid, we would still be compelled to conclude

that either they fail to establish the contentions sought to be established or that any contention established by their use is not a defense to the charges being considered by the Tribunal. Under such circumstances to attempt to make a detailed reply on all errors no matter how minute and no matter how insignificant would be an act of disservice to the Tribunal and by beclouding the fundamental issues in this case would unwarrantedly increase the already heavy burden of this Tribunal. Under these circumstances the prosecution at this time will limit itself solely to a consideration of the major contentions presented by the defense arguments.

2. By electing to follow this broader policy the prosecution does not in the least wish to intimate that the final arguments of the defense do not contain significant and important errors of fact and of argument. Even a cursory reading of any portion of the defense summation makes it patent that the defense summations contain many errors and misstatements and include much material that is not in evidence before the Tribunal. A careful check of the defense arguments against the record discloses that the misstatements, distortions and

other errors are so numerous and that so much material which has been specifically rejected as evidence by the Tribunal has been included that the reliability of the entire summation is to a large extent destroyed. These errors, misstatements, distortions of the record and statements based on rejected materials are not isolated phenomena appearing intermittently throughout the vast body of the text of the defense arguments but permeate its entire structure as a cancerous growth. In certain sections these matters are so inextricably integrated into the whole of the argument that any attempt to separate the bad from the good completely demolishes the entire argument.

3. The fact that the defense summations contain much material admittedly not received in evidence has already been noted by this Tribunal and repeated directions have been given that it be deleted. However, the use of rejected material has not been limited to those instances where reference to rejection has been made and the fact is thus clearly made apparent. In fact such instances are distinctly in the minority. On the whole the practice has been widespread to include those materials without reference to the fact that they had been rejected along

with materials in evidence and without citing any authority for the statements made. The China Phase of the General Summation is notorious in this respect. This lengthy section contains few citations to the record. Statements of fact are made for page after page without any attempt to show their basis in the evidence. Some of the statements of the fact could be authenticated from the record through an incommensurate expenditure of labor and time. Others might be found to have some support in the evidence but could be shown clearly to have been taken out of the context in which they appear. Others could be shown to have been taken from materials rejected as evidence by the Tribunal. Still others have no basis whatsoever either in the record or in the rejected documents but exist solely as unwarranted statements, charges and assertions of the author. If the few citations noted in this section are checked one finds that in practically every instance either the citation does not support the statement made in any respect, or that the statement has been completely divorced from the context, or that the citation only supports one unimportant statement of fact in a series of otherwise unsupported and unsupportable statements, or that a simple statement of fact has

been blown up to such proportions that the basic fact is no longer recognizable. If there be eliminated from this section all matters not in evidence there is left only a few statements of fact, which on the whole are not in dispute and which fall far short of establishing the propositions for which they form the basis.

4. The inclusion of materials not received into evidence is the least objectionable of the techniques employed by the defense in their summations. A more objectionable and a more insidious practice has been the use of only certain portions of the defense evidence in order to establish the defense contentions. We are not here quarreling with the proposition that it is the duty of defense counsel to present his client's case in the most favorable light. We are not particularly concerned with either the practice of culling bits of evidence out of the prosecution evidence divorced from context or with the practice of ignoring completely derogatory evidence brought out on cross-examination of defense witnesses. We are, however, calling attention to the technique used of culling out bits from defense documents and from the direct examinations of defense witnesses, and ignoring other

evidence in those same documents and in those same direct examinations, (often in the same sentences) which alter the entire purport and meaning of the defense's own evidence. In order to support the contention of the section of the General Summation entitled "Japan was Provoked Into a War of Self-Defense," various defense documents and the direct testimony of various defense witnesses are cited to establish that the various economic measures taken by Japan were solely for civilian purposes and the development of a peacetime economy. However, when these defense documents and affidavits are examined, in instance after instance they show that the document disclosed or the witness testified that the development of the peacetime economy was only one of the reasons for adopting the economic measure. In each instance military preparations are given as the basic reason.[a] This technique succeeds in building up a wholly fallacious contention which has no support in the defense's own evidence.

4a. (1) Compare defense statement in J Par. 29, that the Automobile Industry Control Law was introduced into Diet for the production of automobiles for the general people, alleged to be supported by Exhibit 2778A T. 25,002-4, with reasons given in the same exhibit that the industry was indispensable to secure national defense and that it was urgent to establish it to complete national defense.

5. Bearing in mind as a general warning the considerations mentioned with respect to the basic statement of facts in support of the defense contentions, the prosecution will not discuss further the numerous errors in detail, even though important and material, but will pass directly to a consideration of the major contentions advanced by the defense. The contentions of the defense for purposes of analysis fall roughly into three broad categories: (1) The contention that the prosecution has failed to sustain

4a (Continued).

(2) Also compare statement of SAKURAUCHI cited in J, Par. 32, alleged to be supported by Ex. 2779, Tr. 25005-7, with the same exhibit which shows that the problem of stabilizing the peoples' lives was considered together with the national defense question.

(3) Compare statement in J, Par. 38, found in Ex. 2797, Tr. 25093, with statement found in the same exhibit at Tr. 25093-4 that the expansion of heavy industry was closely related to the requirements of the military services and that an increasingly large proportion of Japan's resources was steadily diverted into the strategic industries to the detriment of home industries and the export trade.

(4) Compare statement in J, Par. 42, that Iron and Steel Industry Bill was to promote self-sufficiency including the development of further overseas markets, for which Exhibit 2781A, Tr. 25013-5 is cited, with further statements in the same exhibit that liquid fuels were indispensable to national industry and defense and that the bill would promote industrial development and national defense.

(5) For further examples of the same technique, compare statement in J, Par. 43 as to Exhibits 2786 and 2787, in J, Par. 45, as to Exhibit 2792A, in J 48 as to Ex. 2793, in J, Par. 51 as to Ex. 2795A, in J, Par. 58 as to Ex. 2796A, in J, Par. 60 as to Ex. 2796B, in Par. 62 as to Ex. 2777A with the exhibits themselves. In each instance national defense features

the burden of establishing its case; (2) the various contentions on questions of law and (3) the affirmative and personal contentions.

A. The defense contention that the prosecution has failed to establish its case.

6. It may seem somewhat strange that we should separate for purposes of discussion the two factual elements of the defense arguments and interpose between them a discussion of their arguments on the law. This is being done not because the factual content of the case requires division but because the approach of the defense to their first contention that the prosecution has failed to sustain the burden of establishing its case is unique in character and can be most easily weighed by being considered from that viewpoint. In attempting to establish this contention the defense has for the most part not concerned itself with disputing the basic facts established by the prosecution evidence and confirmed in large measure by the defense's own evidence or with a refutation of the inferences logically deducible from those facts. They have not been concerned with showing that these

4a (5)(Continued).
prominently as a reason for the measure but no mention of that fact as disclosed in these defense documents is made anywhere in the summation.

facts and inferences fail to establish all the constitutent elements of the crimes charged. Their attack has been limited for the most part to an attack upon the nature of the evidence and on the prosecution.

7. We pass over as unworthy of reply and quite beneath the dignity of any court, and particularly this Tribunal, the charges of unethical conduct against the prosecution made from time to time in the defense arguments. If the arguments of prosecution counsel are unsound they will not assist the Tribunal in determining the case, and the use of opprobrious epithets against counsel will not render the arguments any more unsound. But if the arguments are sound and fairly supported by the evidence, the use of approbrious epithets against the prosecution does not weaken the validity of the arguments but only reveals their strength.

8. The attack of the defense upon the prosecution evidence has been of a highly technical nature and the acceptance of their contentions would mean the complete abandonment by this Tribunal of the plain mandate of the Charter that all evidence having probative value be admitted. In each case of an attack upon the prosecution evidence the defense have proceeded upon the theory that the fact that an item of evidence

might be excluded under the technical rules of exclusion of evidence in an Anglo-American court is proof that the item of evidence has no probative value. However, this is inconsistent with the basic theory underlying the technical rules of exclusion in those courts. The purpose of those rules is not to exclude evidence of a nonprobative character. This is amply covered by the broader rules which exclude irrelevant and immaterial evidence. The purpose of such rules is to exclude evidence of a probative character which would be otherwise admissible either because of some public policy or because of a fear that such evidence could not properly be assessed and weighed by the untrained trier of fact. We have here no public policy requiring the elimination of any probative evidence. We have here no untrained triers of fact.

9. Furthermore, as the members of the Tribunal are well aware, many of the technicalities asserted by the defense are not sanctioned by even a court applying the most stringent rules of admissibility of evidence. It is a safe assumption that no court in the world could carry on its duties if it sought to enforce as rules of law the contentions of the defense. Even in the strictest of Anglo-American

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courts not all hearsay is excluded. There are numerous exceptions to the hearsay rule. Statements made by co-conspirators in the course of the conspiracy and statements against interest are universally admitted. Yet, practically every piece of evidence introduced by the prosecution and challenged as violating the hearsay rule falls within one or the other of those two exceptions or of both.

10. One of the most common charges made against certain portions of the prosecution evidence is that they are made up of items taken from newspapers and other publications. This might well be a serious consideration if we were here dealing with items taken from newspapers and other publications published in countries where the principle of unlimited freedom of the press was freely followed and the items represented the unfettered and uncensored discretion of the writer and publisher. That is not the present case. In the few instances where the prosecution has used items from publications of this nature from other countries, it has not used them for the purpose of proving the event but has produced them to show official Japanese knowledge of the happening of the event, a fact clearly inferrible due to the fact that either the item was itself found in the official

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archives of one of the Japanese Governmental organs or contained an official acknowledgment of such knowledge. For the most part the items of this character used by the prosecution have been taken from newspapers and other publications published in Japan, many of them being taken from official publications of the Japanese Government. With respect to those items published in official publications, there can be no question. They are official government statements. We are here trying government officials for the unlawful purposes for which they used their governmental powers. There can be no evidence of higher probative value than the statements made officially by the government or under its imprimatur to show the unlawfulness of their actions. The items introduced into evidence from nongovernmental Japanese publications must likewise be considered as official government statements. The prosecution has shown as an integral part of its case that the Japanese press was not a free press but one that was completely dominated and controlled by the Japanese government. The press could print only what the government organs permitted and only in the manner permitted. It is interesting to note that not an iota of evidence has been introduced in either the general or individual

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phases of the defense to rebut this prosecution evidence. There has not been a single word in any of the defense arguments with respect to the prosecution evidence on this issue. This uncontradicted, unattacked evidence must therefore be taken to be true. In light of this evidence items from Japanese publications are of significant probative value. Such items do not in fact differ from the ordinary official government pronouncement. Unless the government officials desired that these items be published they would not have been printed. Under such circumstances they must be considered as the official governmental versions in the same way and to the same effect as an official government pronouncement put out in the name of the government.

11. A subsidiary charge in connection with these newspaper items is that the prosecution has in the case of certain defendants elected to use a newspaper account of speeches of defendants when the speeches themselves were available. This is predicated upon the assumption that the newspaper version is only a distortion of the speech. Whether or not the newspaper versions are distortions of the original speeches is a matter which this Court can quickly decide for itself by comparing the various items with the speeches.

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But assuming that the charge that the newspaper item is a distortion is true, we must not forget that the distorted newspaper version is just as much a governmental act as was the original speech delivered in the Diet. It was published in the way that the governmental authorities wanted it to be published. It has therefore in weighing government acts probative value equal to that of the speech itself.

THE PRESIDENT: We will adjourn until half-past one.

(Whereupon, at 1200, a recess was taken.)

AFTERNOON SESSION

The Tribunal met, pursuant to recess, at 1330.

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: This Tribunal will take the usual midafternoon recess at 3 o'clock instead of 2:45, and we will sit today until we finish the reply.

Mr. Horwitz.

MR. HORWITZ: 12. The defense challenges the prosecution evidence on the ground that it is mostly documentary and that few witnesses were produced to testify. The inference which they desire the Tribunal to draw is, of course, that the prosecution could not find witnesses to establish their contentions. Whatever merit the argument of such an inference may have before a jury, it is unworthy of being advanced before this Tribunal. The prosecution case is mostly documentary because the prosecution has followed the theory that a documented case is the strongest case based on the well-established principle of law that when a matter has been reduced to writing, the writing is better evidence of its contents and the facts than the oral testimony of any witness. The

silent witnesses in a case -- the documents -- are more reliable witnesses than the living witness. They are not subject to any of the human frailties. They tell their story and neither add to nor detract from it. They do not forget. They cannot be caught unawares. They speak for themselves and are not affected by what others may say about them. Unless altered by human agents they do not change their story. Even when altered they reveal the complete story of their alteration. This defense contention is one of the most curious arguments that has ever been presented to any Tribunal. What better evidence could there be of a plan of aggressive warfare than the very plan itself? Could any witness speak with greater strength and more conviction than the written plans and orders for the printing of occupation currency for use in the Southern regions dated more than nine months before war began?

13. If there were ever any doubts that documentary evidence is the best evidence, those doubts should forever be laid to rest by the events of this case. We have seen in this courtroom one of the key architects of the demands made on China through Germany in December 1937 -- the defendant KIDO -- state that he could not remember these terms. (13a. T. 31,423-5)

If one of the principal drafters of the demands could not remember the terms, what witness could there be who could as adequately describe to this Tribunal those terms as could the official document containing them? One of the most interesting examples of the superiority of documentary evidence over that of a living witness is found in connection with the series of telegrams sent by Consul KUWAJIMA to the Foreign Minister with respect to the activities of DOHIHARA and others in bringing Pu-Yi to Manchuria. These were a series of official reports to the Foreign Office for the information and use of that office. In order to belittle the strength of this evidence, KUWAJIMA was produced by the defense and he testified that his information was received from any source available such as newspapers, conversations with Japanese and Chinese and rumors.[b] In short KUWAJIMA attempted to undermine his own official reports by a blanket statement of the source of his information. Unfortunately, KUWAJIMA completely forgot that in each instance in his reports he had disclosed the source of the particular piece of information he was then transmitting and had been very careful to distinguish between those items based on rumor, or newspapers and those based on more reliable sources of information.

~~(13b. Ex. 3179, T. 28,649-50)~~

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~~(13b. Ex. 3179, T. 28,649-50)~~

Of nine reports submitted by him on these activities only two originated from newspapers.[c] The evidence contained in those two is largely corroborated by the remaining reports and other evidence. Of the remaining seven, two are based on conversations with DOHIHARA,[d] two are based on conversations with representatives of the Japanese army,[e] one is based on a conversation with Yao Chen,[f] one on a conversation with Cheng Chui, the son of the puppet Prime Minister of Manchukuo,[g] and one is an overall report based on a secret investigation made by KUWAJIMA, which he stated was supported by "unmistakable proof."[h] With respect to the last item, since KUWAJIMA was well aware of the differences in value of sources of information, he can hardly be said to have meant rumors when he spoke of unmistakable proofs, especially in view of the fact that he was reporting officially to his superior on a serious matter. The documents themselves are thus much more specific as to the sources of information than KUWAJIMA's general statement. They are likewise much more accurate than KUWAJIMA's generalized and conclusional statement

(13 c. Ex. 292, T. 4,375; Ex. 293, T. 4,376
d. Ex. 289, T. 4,364; Ex. 290, T. 4,367
e. Ex. 295, T. 4,381; Ex. 304, T. 4,402
f. Ex. 287, T. 4,360
g. Ex. 291, T. 4,373
h. Ex. 300, T. 4,394)

in response to the broad question of what methods he had employed in securing the information sixteen years earlier. KUWAJIMA had to admit this fact. When asked by the President if he had any reason to doubt the accuracy of his reports to Tokyo in exhibit 289 regarding his personal talk with DOHIHARA, the witness answered that he had no reason to doubt.[i] After the prosecution counsel read to him part of exhibit 300 pertaining to his talks with DOHIHARA, he testified that he had nothing more to answer.[j] The testimony of KUWAJIMA has therefore added nothing to what the Tribunal already knew with respect to each document from the documents themselves. His testimony has not advanced the case in any particular.

14. This same argument has been repeated in another form. The Tribunal is repeatedly requested to ignore the documentary evidence introduced by the prosecution because certain defense witnesses have testified to the contrary and the prosecution has not cross-examined those witnesses. Throughout the course of the presentation of the defense evidence the prosecution again and again made it clear that it was not cross-examining certain defense witnesses because their cross-examination would not further the proceedings

(13 i. T. 28,665
j. T. 28,666)

in any manner whatsoever. For at least two reasons, both of which are clearly apparent from the defense evidence, it was useless to indulge in lengthy cross-examination of many defense witnesses. In the first place the prosecution evidence already introduced was largely made up of official documents. These documents spoke for themselves. Nothing that the witnesses might say could alter or change their meaning in any particular. If the testimony of any witness was contradictory of the official documents, nothing was to be gained by his cross-examination. He was already impeached by the documents themselves. To have gone through the formality of cross-examining him on documents already in evidence and known to the defense before the witness took the stand would have been a sheer waste of time and contrary to the express wish of the Tribunal. Accordingly, the prosecution adopted in lieu of cross-examination the time-saving practice of giving reference to the documents already in evidence which contradicted the witness. In the second place in many instances if the testimony of the defense witnesses is stripped of the conclusions and opinions of the witnesses, the hard core of fact remaining directly corroborates and supplements the ~~prosecution's evidence. Under such circumstances to~~

have cross-examined the witnesses on their opinions and conclusions, especially after the Tribunal had made it clear that it was disregarding these added features, would have served no purpose whatsoever.

15. The defense fetish on the question of witnesses has been carried even further. They assert or intimate that the prosecution had the duty to call certain named Japanese witnesses who have peculiar knowledge of certain events or certain defendants. They charge that the prosecution failed to do this because it well knew that the testimony of these people would be favorable to the defendants. This argument is a weapon which is much more dangerous to the attacker than to the attacked. The prosecution knows of no duty which requires it to call witnesses favorable to the accused, especially where the witness is known and is available to the defense. All of these witnesses were in Japan and they were all known to the defense. Yet the defense did not see fit to call them. If their testimony was so vital to the defendants, and if their testimony would have been so favorable to the defendants, as is intimated, it is not at all unfair to inquire why they were not called by the defense.

16. Failing in their attack upon the

prosecution's documentary evidence, the defense next turn their attack upon the prosecution witnesses. These attacks are not limited to discrepancies in the testimony or to contradictions or to matters to be found in the record. They are on the whole based on matters outside the record and in many instances they are made in complete disregard of the record. This entire process can be illustrated by the attacks on three of the principal prosecution witnesses.

17. The most interesting attack made upon a prosecution witness is that made on General TANAKA, Ryukichi. He is charged with being a professional witness, of having testified about too many things and with being biased. The inference is therefore that his testimony is a complete fabrication unworthy of belief. All of these charges made against TANAKA completely ignore the fact that he is just as much a defense witness as a prosecution witness. It ignores the fact that he testified on three occasions for the prosecution[a] and on five occasions for the defense.[b] It ignores the fact that he even appeared as a witness for the defense during the general phases and that only three of the defendants interposed any objection

(17 a. T. 1945-2177; T. 14,285-422; T. 15,853-951
b. T. 22,713-58; T. 22,943-68; T. 29,030-64; T. 29,406-18; T. 36,924-5)

to his being so called.[c] The defense would like the Court also to forget this fact. In many of the summations when they desire to use certain of his evidence which is thought to be favorable to one of the defendants, they have carefully designated him each time his name is mentioned as "prosecution witness TANAKA" even though the testimony referred to was given as part of the defense case. The defense likewise ignore that TANAKA's wide knowledge of many facts of this case was brought into the case by defense efforts. The prosecution introduced the witness TANAKA to testify on a limited group of issues out of the many issues in this case -- the Manchurian and North China events. It was the defense who disclosed his wider knowledge through their cross-examination. The defense charge bias because his testimony is unfavorable to some of the defendants and favorable to others and not because they can point to any evidence to show bias. In a case of this magnitude it is not surprising that the testimony of a witness should not be equally damaging to all. It would indeed be real grounds for suspicion if TANAKA's testimony had tried to implicate all. The defense's real objection to TANAKA's testimony is that unlike most of the Japanese witnesses who appeared

before this Tribunal he testified directly and forthrightly, naming names and fixing dates without attempting to evade. The defense attack on TANAKA is by necessity a general blanket charge. They can point to little that is specific. The most they can do is point to an error in a date, a fact which the witness himself conceded. Such errors do not make a witness' testimony untrustworth especially when so much of it is confirmed by uncontestable documentary evidence.

18. The charges made against the witness Liebert are in direct contradiction to the record. He is charged with having given opinions and conclusions and with having made up his figures out of his head. The charge with respect to conclusions and opinions is of little consequence. The Tribunal has repeatedly stated that it would not consider such matters. However, it should be noted that despite the Tribunal's statement, the defense made Liebert's conclusions a definite part of the case. The record of the three days cross-examination of this witness was practically entirely devoted to questions about his conclusions and opinions. The charge that Liebert's figures were unsubstantiated and were made up by him shows a completely negligent disregard of the record. Most of Liebert's important figures were graphically illustrated

and the graphs were introduced into evidence as part of his direct testimony. The graphs themselves were reproduced as part of the transcript.[a] Each and every graph shows on its face the exact source of the figures used. Each of the sources was either a government organ or a government controlled organ. Little attempt was made to cross-examine Liebert on the source of his figures although Liebert was willing and prepared to answer any specific question. In one instance on being cross-examined as to aircraft production, Liebert stated that he had with him a document with some very exact figures on aircraft from the Japanese government which had been summarized in his direct testimony.[b] As soon as this disclosure was made, the matter was dropped and no effort made to examine the paper. Notwithstanding this, Liebert is accused of not substantiating his aircraft figures.[c] This entire attack is a belated thought. The defense never had any doubts as to the official character or the accuracy of Liebert's figures. They so stated in open court. During the direct-examination of the witness OWADA during a general phase, Mr. SHIOBARA, when invited by the President to have the witness deal with

(18 a. T. 8282, 8286, 8333, 8335, 8338, 8356, 8357, 8518, 8556, 8641.
b. T. 8640-1
c. Defense Summation J, p. 30)

Mr. Liebert's figures states:

> "Mr. Liebert's testimony was based mostly on the materials which he had obtained from the Japanese government, and as far as the figures are concerned they are mostly correct."[d]

19. The attack on the witness Ballantine is of a more insidious character. Although we might devote considerable time to examining the various unwarranted statements made in the defense summation on the diplomatic negotiations with the United States particularly in reference to Mr. Ballantine, one example will suffice since it is illustrative of the whole document. In the cross-examination of Ballantine on the question of equality of commercial opportunity, the following questions and answers appear:

> "Q Now, in view of those proposals and conversations, did not the Department of State consider that there had been a meeting of minds on this point subject only to securing the authoritative, that is to say, the written provisions to that effect from the Japanese Government?

(18 d. T. 18,268)

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(18 d. T. 18,268)

"A. The fact of the matter is we never got a reply to our memorandum of November 15, and KURUSU, on November 18, made statements to the Secretary which threw doubt on how far the Japanese Government could ever go in the matter.

"Q Will you tell us as well as you are able to remember what those statements of Mr. KURUSU were?

"A That statement is in the record of the memorandum of conversation. My recollection is that he said that at the present time the Japanese Government couldn't do anything about exchange controls that they had imposed in China, that he could make no promise as to what the Japanese Government could do after the war, and that he made no definite reply when the Secretary of State asked whether the Japanese Government could commit itself in principle to these points.

"I should prefer to have that taken directly from the record, for I am not sure of my memory always."[a]

On the basis of this testimony it is charged that

(19 a. T. 10,942-3)

Ballantine was evasive and unresponsive.[b] His entire answer is plainly and directly responsive to the question asked. His answer is clear that there had been no meeting of minds because of Mr. KURUSU's statements made on November 18 and he repeated their contents. Certainly his statement that he preferred to have KURUSU's statement taken directly from the memorandum of the conversation does not reveal any evasiveness. It only reflects the extreme care for accuracy with which Mr. Ballantine testified and his willingness to be corrected if in error. However, this very meticulousness for accuracy is made the basis of an insinuation, if not a charge, that Mr. Ballantine was lying. The defense go on to say: "It was seemingly with good reason that he distrusted his memory; for no such record has been produced. Had it been, we might reasonably expect to find that in the light of it Mr. Ballantine's statement of the effect of KURUSU's language would be subject to the qualifications with which one must usually accept his conclusions." Whatever inference may be made because of the prosecution failure to produce that record, it is subject to a counter inference against the defense. Mr. Ballantine identified the exact record and counsel knew where

(19 b. (Blakeney Par. 27) Defense Summation K, Par 27)

it was to be found. The failure of the defense to produce the record under such circumstances can be inferred to indicate that the record mentioned did not contradict Mr. Ballantine but in fact verified his statements. If it did not, it would have been produced by the defense. In this part of its case the defense undertook to cover every facet of the case not already covered and if the record belied Mr. Ballantine, it would have been produced. We need not rely alone on an inference from the non-production by the defense of the record. The defense itself introduced into evidence an excerpt from the memorandum of November 18, 1941, carefully deleting from the excerpt any and all matters dealing with trade equality.[c] If the excised portion had contradicted Mr. Ballantine in any particular it would not have been excised. The only permissible inference is that the excluded portion of the memorandum fully supported Mr. Ballantine.

20. When the defense depart from their usual procedure of attacking the probative value of the prosecution evidence and turn to consider the facts established by the evidence and the inferences to be drawn therefrom, it is significant to note that they

ignore entire sections of the evidence, or treat it very lightly or treat it as being particularly applicable only to one individual defendant. In this connection it should also be noted that large portions of relevant evidence introduced by the defense itself are likewise ignored. For example the defense summations are significantly silent about the various plans for the political and economic domination of Manchuria. Yet it is that particular group of plans which shed most light on the purpose behind the series of events that occurred in that portion of China and give special meanings to subsequent events in wider areas of the globe. This is symptomatic of the entire defense approach to the prosecution case. Not only has the defense isolated certain portions of the prosecution evidence by failing to consider it but they have persistently applied the technique of examining those portions of the prosecution evidence which they do consider solely as individual items of evidence completely divorced and isolated from each and every other piece of evidence.

21. It is this attempt to consider each piece of prosecution evidence as an isolated phenomenon which has led the defense to dwell on agruments patently fallacious. For example in the Manchurian

phase of the general summation it is argued that since the prosecution evidence shows that in 1937 in Manchuria there was produced 1,800,000 pounds of poppy seed and since the evidence also shows that to meet the demand of opium users in Manchuria 6,000,000 pounds of smoking opium were used, it is clear that Manchuria was not producing enough opium to meet its requirements and therefore the prosecution contention fails because of impossibility. Leaving aside the fact that the 1937 crop of poppy seeds was 2,800,000 pounds and not 1,800,000 pounds as stated by the defense,[a] it is obvious that the defense here has fallen into one of the commonest errors in the field of statistics. They are endeavoring to compare two different items without considering the most important statistical factor of correlation which would make them comparable. The comparison is useless unless we know how much smoking opium if any can be derived from one fixed unit of poppy seeds. There was evidence in the record that raw opium is only one of the ingredients of smoking opium.[b] There was also evidence in the record that adulteration was also practiced with respect to narcotics.[c] The defense

(21 a. Tr. 4,739-40
b. Ex. 374, Tr. 4,675
c. Ex. 397, Tr. 4,796)

comparison does not account for these factors. If the defense had considered the other evidence as to opium in Manchuria -- the increasing production and sales, the increasing addiction among young people, the great exports of opium from Manchuria -- they would have become aware that there must be some fallacy in their argument. There was sufficient evidence to put them on inquiry. And, inquiry would have immediately brought to their attention the simple known fact which is contained in any good standard encyclopedia that opium is not derived from the poppy seed. The poppy seed is the only part of the poppy plant from which opium cannot be obtained. The only purpose the poppy seed serves in the production of opium is to produce the plant from which opium is produced. When we consider the infinitesimal weight of the poppy seeds produced by just one of these familiar plants in comparison with the weight of the rest of the plant, from all of which opium can be produced it becomes immediately clear that the crop of poppy plants, which produced 2,800,000 pounds of poppy seeds, would have weight at least a hundred times as great. All of this tremedous weight is opium producing material. The seeds were only the foundation for an even larger crop of poppies in 1938.

22. The prosecution case cannot be rebutted by examining specific bits of evidence in isolation as though the verious pieces of evidence are unrelated to each other. The prosecution cannot subscribe to the defense thesis that the whole is only the sum of its parts. Whatever merit this axiom may have in the field of Euclidean geometry, it is of no validity in the field of human action and humen relations. The law with respect to one of the crimes which this court is now trying expressly repudiates that proposition. The entire law of conspiracy is predicated upon the fact that the combined action of two or more persons is more dangerous to peace and order than the total of each of the persons acting individually. Human acts do not exist in isolation. They have a place in time and their meanings differ depending upon the circumstances under which they are carried out. Their significance is only comprehensible in terms of all the circumstances surrounding them. They are at the same time the products of acts which have preceded them and are the genesis of other acts which follow. In assessing the importance of any particular act or in determining its significance we cannot therefore ignore contemporaneous acts and other acts which precede and follow it. An act in itself may seem

innocuous but when viewed from the point of view of its time and other acts, it may take on a significance of the highest importance.

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A program for the expansion of major industries by Japan in 1937 may appear on its face to be a completely innocent plan for the improvement of industry. However, if this plan specifically states that its purpose is to carry out another plan which is a plan for the production of war materials, the first plan must be reconsidered in the light of the second. And if we find that shortly preceding those two plans there has been a decision in 1936 fixing a policy of aggression as the national policy of Japan, and determining upon an increase in military strength to effectuate that decision, both of the plans take on a new significance, which cannot be found in either alone. If after the preparation of the plans, we find that Japan has taken a series of concrete measures, which follow the provisions of the plans and which, according to the defense's own evidence, all have the one factor in common that one of their purposes is military preparation, the concrete measures take on a new significance both individually and collectively. It is therefore not without reason that the defense has confined their examination of the prosecution evidence on the economic preparations for war to the various plans and measures as isolated units unrelated to each other. It is likewise not without reason that in

the summation on the diplomatic negotiations with the United States that the defense has seen fit not to burden the Tribunal with a chronological review and analysis of the negotiations. It is the chronology and the circumstances surrounding these negotiations which gives significance to them. It is only by avoiding considering them chronologically and in the light of other events that the defense could enunciate a defense which is a perversion of history.

23. The defense have gone far in applying their technique of isolating particular pieces of evidence. Although warning against the danger of considering the negotiations with the United States separately from other events, the argument proceeds to consider these negotiations as completely isolated and divorced from events transpiring in Japan, in Europe, in China and French Indo-China -- all of which give particular significance to the negotiations themselves. This particular portion of the defense summation is not content to isolate each particular document. It goes even further in its effort to show that Japan made concessions and examines in isolation specific parts of a single document. At this point the prosecution is not concerned with whether the various changes in wording made an actual concession.

The prosecution has already examined these documents and expressed its views in its opening argument. It merely wishes to call to the attention of the Tribunal that the whole of an idea expressed in a document is more than the sum of its individual sentences. The reaction of a reader to a particular document is just as often determined by the tenor of the whole document, the way it is put together as it is by its particular sentences and phrases. It is very often determined by matters outside the document itself. Whether the United States reactions to the several Japanese proposals that they presented no real concessions was sincere can only be determined by the entire documents themselves and all the circumstances under which they were delivered.

24. The approach to the prosecution case by an examination of fragments of documents or by the isolation of particular acts is no more valid or useful than an attempt to assess the value as a work of art of one of the great medieval mosaics by examining each tile individually and separately through a microscope and then concluding that the work was of no value because each tile was in itself only an ordinary piece of colored tile of no special artistic value. In either case no attention is paid to the picture itself

and to the concept and design and pattern which give it meaning. In neither case is attention paid to the fact that the many, many component parts of it fit together naturally, or to the fact that the many parts are interrelated and that all the interrelated parts reciprocally enhance the meaning of each other or to the fact that the final product is an integrated and completed structure.

25. The prosecution case from beginning to end is one complete story. It is a logical story; it is a natural story. From beginning to end the events follow inexorably one after the other. The method of attack adopted by the defense concedes this. They have attacked neither the story itself nor its completeness nor its logic. They have been concerned only with particular sentences completely divorced from the text. The prosecution case is a sturdy structure built upon a deep and firm and solid foundation of fact. To its destruction the defense have brought as tools a microscope and a toothpick. Their task is now completed. The structure still stands undamaged. There remains now to be considered the affirmative contentions which the defense have raised to determine whether they justify the modification of the judgment which the facts established by the prosecution case

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requires.

B. The Defense Contentions of Law.

26. In its opening argument the prosecution attempted to anticipate the major defense contentions on matters of law and demonstrated the fallacy of all those that could be reasonably anticipated. No one, however, could be reasonably expected to have anticipated the mass of contradictions, the untenable theses, and the wholly abhorrent philosophy of futility that the defense has set forth in its arguments on questions of law. It is most doubtful whether a comparable set of alleged propositions of law have been propounded before any other tribunal in the entire history of jurisprudence. The defense arguments on law are particularly noteworthy because of their utter lack of consistency. Propositions are advanced to meet one situation and then abandoned in the next situation and the converse is stated. Great efforts are made to establish a proposition, and when it becomes apparent that the reasoning has led them into a cul-de-sac, equally great efforts are made for immediate purposes to demolish what they have already tried to prove and to establish the exact opposite of the first proposition. The Tribunal is told that the conflict in China with its toll of millions of lives, with huge armies

on both sides engaged in battle over an area of half a continent was not a war as a matter of law because the parties engaged in it had not issued declarations of war.[a] Yet the Tribunal is also told that as a matter of law the United States and Germany were at war in September 1940, even though neither parties had issued any declaration and even though not a shot had been fired.[b] Belligerency is asserted as a defense to the murder counts and non-belligerency is asserted as the defense for the mistreatment of prisoners of war in connection with the conflicts in which the murders were committed. Treaties are stated to be mere pieces of paper without binding effect so that Japan has committed no wrong when she acts in violation of them. Yet when another nation lawfully renounces a treaty in the very manner provided for in the treaty for renunciation, the Tribunal is urged to find that such a renunciation constituted both in fact and in law such a menace to Japan that the latter was justified in attacking that first nation with armed force as a measure of self-defense. Each and every argument that the defense advances is one of expediency to meet the problem of the moment.

26-a. Defense Summation C, p. 19; 21.
b. Defense Summation E, p. 15.

27. The defense argument by necessity must be one of expediency for the moment. That course is dictated by the philosophy upon which they have elected to stand and which they ask, at least inferentially, this Tribunal to adopt. In the opening pages of their lengthy argument the defense state "if it (war) can be often observed as unavoidable occurrence arising out of social relationship and biological existence of human life, we must frankly recognize it as a force, like physical force of nature, which is sometimes beyond human control."[a] A little further on we are told that world war is a progressive step taken by the world from the past to the future and that it is a revolutionary manifestation of human destiny.[b] Here in these few sentences is the real defense which the defendants are attempting to establish in this case. The rest of their lengthy arguments is only a series of variations on this one underlying theme. The defense thus places its reliance solely and squarely upon the proposition that war is irevitable and necessary.

28. Neither the prosecution, nor the great nations which it represents, can give their sanction to

27-a. Defense Summation A, p. 5.
b. Defense Summation A, p. 11.

the abhorrent and anarchical doctrine that war is inevitable. Wars are conceived by men; they are created by men; and they can and must be stopped by men. If in the past wars between nations have seemed to be inexorably inevitable, it is not because they were an inevitable part of man's destiny and progress, but because mankind had not learned to apply the lessons it had learned throughout the centuries in its living together in smaller communities to the problems of the largest community -- the international community. International war is basically the application and use of physical force for the solution of differences, real and imagined, among groups of human beings called nations arising out of the frictions that occur in the social relationships of these nations. If the argument of the inevitability of war -- that is, the impossibility of eliminating the use of physical force as a means of solution of differences between human beings in the international community -- has any validity, it must solely be because there is something inherent in the nature of mankind which makes it impossible to eliminate physical force as a means of solving human differences. The whole course of history and civilization teaches us that this is not true. Mankind has progressively abandoned the use of

force and substituted peaceful processes of law and order on an ever-widening scale. Beginning with the smallest social group, the family, and continuing throughout the hierarchy of social groups of ever-increasing size -- the clan, the city-state, the feudal fief and the nation -- mankind has been able to disregard physical force and to solve the differences between men and between groups of men by the peaceful processes of law and order. In each instance he has worked out his system of law and order and has punished those who seek to redress their grievances by the use of physical force and those who disturb the peace and order created by that system of law and order. There is nothing inherent in the international community itself which makes the elimination of force an impossibility. Differences neither in race nor in language nor in customs have prevented the various nations from replacing regimes of physical force with regimes of law and order within their own confines. There is nothing in any of these factors which militate against nations doing the same thing with respect to their relations with each other.

29. Mankind has gone far in overcoming the physical forces of nature which in the past he has regarded as inevitable calamities. He has learned to

eliminate the most virulent diseases and to prevent their recurrence. He has learned to build his buildings so that they can withstand the severest earthquakes. He has learned how to fireproof his buildings against the holocaust of fire. He has learned to build ships and airplanes that will withstand the worst storms. He has learned to dam his rivers against the ravages of floods and to utilize the waters for his own enrichment. He has succeeded in releasing the energy of the atom itself and is now working zealously to learn how to harness it for his own betterment. Is therefore the scourge of war, the one destructive force to orderly and peaceable living for which mankind is solely and entirely responsible, the only destructive force which he cannot eliminate?

30. If anything could be more abhorrent than the doctrine that war is inevitable and beyond human control, it would have to be the basic theory underlying the doctrine. War, according to the defense, is an unavoidable concomitant of the biological existence of human life. If we follow this proposition to its logical conclusion, we must find that since the only things which are unavoidably part of the biological existence of human life are those things including eventual death which are necessary for biological

existence, then war is necessary to the biological existence of human life. This is what the defendants mean when they tell us that war is a progressive step in the cosmic process and a revolutionary manifestation of man's destiny. This is the basic defense which the defendants have pleaded to this court. They do not regard their acts as criminal because they in fact regard themselves as benefactors of mankind because they brought to it war which is unavoidable and which is necessary. It is in the light of the subscription to this philosophy that we must regard the statements of MATSUI that he regarded the fighting in China as the chastisement of a younger brother by an elder and his protestation of his great sorrow for those that died.[a] It is in light of this defense that we must examine the claim that these defendants were men of peace. Can any man who proclaims himself an adherent of a doctrine that war is necessary ever be a man of peace? It is against the background of this philosophy that the specific legal contentions of the defense must be weighed.

30-a. Ex. 3498, T. 33,815.

31. The defense contentions with respect to the matter of the jurisdiction have added nothing significant to what they had already advanced in their motions to dismiss at the beginning of the trial and set forth no reason why the Tribunal's decision overruling these motions should be reversed at this time. An attempt is made to define "war criminals" as those who commit crimes "in a war"[a] and even to further narrow the definition so as to limit the term to those who commit crimes "during a war."[b] No reason is advanced why the term should not be given its more obvious and more commonly understood meaning of those who commit crimes "in connection with war." "War crimes" are not limited solely to crimes committed during a war but include any crime associated with or directed to war, whether or not such a war is actually in progress at the time of the commission of the offense, or even if the plan miscarries and no war actually results. The test lies not in the time element but in the intention of the perpetrators. The defense ignore their own evidence that the term was used as defined by the prosecution in the Potsdam declaration. They attempt to escape the effect of the two entries in KIDO's

31a. Defense Summation C, p.4; 31b. Defense Summation C, p. 5.

diary about the punishment of "those responsible for the war" by a belated quibble about the translation of the Japanese term and an improper suggestion as to the sense in which KIDO used the words, a matter which is not in evidence. The translation in the record has never been challenged and is in fact the defense's own translation as well as that of the prosecution since it appears in KIDO's own affidavit in two instances.[c.] Bearing in mind the tremendous importance KIDO has laid on alleged mistranslations of his diary, the use by him in these instances of the same translation as that offered by the prosecution should be full guarantee that the translation used expressed the meaning he wished to convey accurately and completely. The proposition established by the prosecution that the Charter is binding upon the Tribunal in all matters of jurisdiction remains unchallenged and unaffected.

32. Likewise in dealing with the question whether or not aggressive war is a crime at international law and other cognate questions, the defense have presented no new contention. However, it is necessary to call the Tribunal's attention to the materials which have been used to support the defense

<u>Slg</u>. Ex. 3340, T. 31175, 31178.

contentions and to the manner in which they have been used. On this topic, as well as on others, there are a number of unsupported assertions of fact and citations from writings, either which are not of a legal character so as to be deemed a proper source of the law, or if they are proper legal writings, contain assertions of fact and even surmise not supported by evidence or recognized as history. Such assertions and citations are manifestly improper and are unworthy of consideration.[a.] With respect to the Kellogg-Briand Pact citations are made to various contemporary discussions which are alleged to clarify its meaning. Some of these were tendered in evidence[b.] but withdrawn on the agreement of counsel on both sides that an official document of proper materials should be supplied to the Tribunal. Subsequently in accordance with the agreement of counsel, the Tribunal was furnished with the official United States publication entitled "Treaty for the Renunciation of War" which contains all the notes exchanged between the parties to the pact and all the ratifications. These notes can properly be considered to explain ambiguities, which we do not admit, in the pact itself. However,

32a. See defense summation B, pp. 13, 15, 21, 40, 43, 51, 117, 120.

b. T. 26387-93.

the agreed volume does not contain any discussions in the United States Congress or its committees or in the Japanese Privy Council, selected extracts from which have been quoted in the defense summation.[c.] Even if permitted under the agreement of counsel, these extracts could not be properly used to explain the pact. These are ex parte and unilateral statements which cannot affect the other parties to the pact. This is particularly true with regard to the Japanese Privy Council whose proceedings were not made public. It might well be pointed out that much of this improper material does the defense position more harm than good. The passage cited to the Japanese Privy Council enumerates certain undisclosed mental reservations with regard to China, especially Manchuria and Mongolia, but states that "it would be more opportune to refrain from making such a declaration on this occasion."[d.] Even at the time of ratification of the treaty Japan was contemplating aggressive actions in those regions and intended to twist the treaty so as not to interfere with her plans.

32c. Defense Summation B, pp. 49-51, 55-8, and J, pp. 1-12.
d. Defense Summation B, pp. 55-6.

33. Not only have improper materials been used, but also materials proper in every respect have been used as the bases for propositions they not only do not support but in fact wholly and expressly contradict. In discussing Oppenheim's opinion that a state which deliberately orders the commencement of hostilities without a previous declaration of war or a qualified ultimatum commits an "international delinquency," there is a serious misrepresentation of a passage of the author which is alleged to contain a "warning that international delinquency must not be confused either with so-called crimes against the law of nations or with so-called international crimes."[a.] The inference expected to be drawn is that the violation is only an international delinquency and not an international crime. However, what Oppenheim actually says in the passage relied upon (para. 151) is:[b.]

"The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligations, involving no more than pecuniary compensation, to violations of international law amounting

33a. Defense Summation B, p. 38.
b. Oppenheim, 6th Ed., Vol. 1, p. 307.

to a criminal act in the generally accepted meaning of the term."

And in para. 153a[c] he says:

"As States are the normal subjects of international law, they -- and they only -- are, as a rule, subjects of international delinquencies. On the other hand, to the extent to which individuals are made subject to international duties -- and consequently, of international law -- they are also subjects of international delinquencies. This is the case not only with regard to piracy and similar topics of limited compass. In particular, the entire law of war is based on the assumption that its commands are binding, not only upon States but also upon their nationals, whether members of their armed forces or not."

And in para. 156b[d] he says:

"The responsibility of States is not limited to restitution and to damages of a penal character. The State, and those acting on its behalf, bear criminal responsibility for such violations of international law as by reason of their gravity, their ruthlessness, and their contempt of human life place them within the

c. Ibid., p. 309.
d. Ibid., pp. 321-2.

category of criminal acts as generally understood in the law of civilized countries. Thus if the government of a state were to order a wholesale massacre of aliens resident within its territory the responsibility of the state and of the individuals responsible for the ordering and execution of the outrage would be of a criminal character. The preparation and the launching of an aggressive war -- now that resort to war as an instrument of national policy has been condemned and renounced in solemn international engagements must be placed within the same category.

"Yet it is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation. Moreover, the extreme drastic consequences of criminal responsibility of states are capable of modification in the sense that such responsibility is additional to and not exclusive of the international criminal liability of the individual guilty of crimes committed in violation of international law."

This citation offered by the defense fully substantiates the prosecution contentions.

34. In an alternative approach to the law of the case, to escape from the consequences of the fact that the various aspects of aggressive war are crimes in international law, the defense has set forth an elaborate series of legal propositions as justifications for Japan's actions. For purposes of analysis these propositions can be divided into four main categories: (1) That a declaration of war is a *sine qua non* to the existence of a war and without it there is no war and therefore no liability for the war itself or for any of its consequences; (2) that there may be acts short of war; (3) that an act criminal at the time of its commitment may not be punished criminally if it is subsequently condoned or ratified; and (4) that an act otherwise criminal is justified if committed in self-defense. Of these four major defense propositions, only the second and fourth are legally sound. Whether or not they are applicable is, of course, solely a question of fact. The discussion of the fourth will be reserved for later consideration.

35. The first of these defense legal propositions is an excellent example of eating one's cake and also keeping it at the same time. The proposition advanced has been most elaborately

worked out and can be stated as follows: A declaration of war is necessary to the existence of a state of war; and since Japan did not declare war when initiating any of the hostilities which are the subject of the Indictment, and since until the Pacific War those whom she attacked did not choose to do so, therefore in law there was no war and therefore there could be no war crimes. This argument has been carried to the length of contending that because there was no declaration of war, Hague Convention IV had no application and prisoners of war captured in these operations no protection.[a] The fallacy of the proposition that a declaration of war is necessary to the existence of war has already been discussed in paragraph E-63 of the prosecution summation and what is stated there need not be repeated here. Since the fundamental proposition itself falls, the entire structure upon which it is built falls with it. The entire argument shows an apparent confusion between the matter of the technical position of third countries with regard to neutrality because no declaration of war has been made and the factual question which determines the commission of the crime of aggressive war. No organized society permits the parties to a

34a. Defense Summation C, pp. 31-2.

crime to determine for themselves whether a crime has or has not been committed. The defense itself, after elaborately presenting its argument, admits its fallacy when they state:

"The inescapable conclusion, consequently is that 'undeclared war' stipulated in the Charter can only mean such hostilities as mentioned which in the international legal concept rises to the stature of war though undeclared; or in other words, war which except for the formal declaration is identical in all essentials and consequences with a declared war and not lacking in any other element. Measures short of war and undeclared war are not equivalents."

The defense in effect admit the validity of the prosecution contention and accordingly shift to their second ground which would justify Japan's action as measures short of war.

35A. Admittedly, international law has recognized certain types of hostile acts as lawful measures short of war. These types are confined within narrow limits. A list and discussion of measures short of war recognized by international law is to be found in Oppenheun, 6th Ed., Vol. II, Chapter II, pp. 106-125. None of them has any application

in the present case to any of the hostilities in which Japan was engaged. None of Japan's acts were measures short of war. This can be readily seen by applying two simple tests. First, did the accused intend to confine their hostile acts within the recognized narrow limits of measures short of war and did they actually so confine them or did they wage a war in everything but name? Did the accused have any of the justification which would bring their operations within these narrow limits, and even if they had them in the beginning did they use them as pretexts for large-scale wars? The defense of "measures short of war" is valid only if it can be shown that all the necessary elements are found to exist. To avail themselves of this defense, the accused must show that they had justifications which would permit them to take measures short of war, that the justifications were not used as pretexts for aggressive purposes, that they intended to confine their hostile acts within the recognized narrow limits and they did in fact so confine them. The historical examples cited by the defense[a] well bring out this point. Some of the cases cited are genuine examples of "hostilities short of war," while others like the Italian-Ethiopian

35A-a. Defense Summation C, pp. 23-24.

in the present case to any of the hostilities in which Japan was engaged. None of Japan's acts were measures short of war. This can be readily seen by applying two simple tests. First, did the accused intend to confine their hostile acts within the recognized narrow limits of measures short of war and did they actually so confine them or did they wage a war in everything but name? Did the accused have any of the justification which would bring their operations within these narrow limits, and even if they had them in the beginning did they use them as pretexts for large-scale wars? The defense of "measures short of war" is valid only if it can be shown that all the necessary elements are found to exist. To avail themselves of this defense, the accused must show that they had justifications which would permit them to take measures short of war, that the justifications were not used as pretexts for aggressive purposes, that they intended to confine their hostile acts within the recognized narrow limits and they did in fact so confine them. The historical examples cited by the defense a well bring out this point. Some of the cases cited are genuine examples of "hostilities short of war," while others like the Italian-Ethiopian

35A-a. Defense Summation C, pp. 23-24.

War of 1935[b] were obviously not. The hostilities conducted by the accused prior to the Pacific War meet none of these tests. They do meet the test for an undeclared war which the defense themselves have laid down.

36. With respect to the crimes charged to have been committed against France and Thailand, the defense plead subsequent condonation and ratification. This is wholly novel in the doctrine of the criminal law. It is wholly unknown in the domestic criminal law, one of the acknowledged sources of international law. The action of the aggrieved party cannot change an act which was criminal at the time of its commission into a lawful act. A crime committed against a person is not only an offense against the person against whom it is committed but is also an offense against the state. The state alone may condone or ratify the offense against it. If I am assaulted by another, I may amicably and of my own free will settle the matter with him and release him of all civil liability to me. What I do, however, has no effect upon the right of the state to prosecute him for the criminal act committed. Likewise subsequent condonation or ratification by the aggrieved party cannot

35A-b. Oppenheim, Vol. II, pp. 129-30.

change an act of aggressive war, an international crime, into a noncriminal act. Even if such condonation or ratification could alter the nature of the act, the evidence in the case shows overwhelmingly that the ratifications and condonations relied upon were obtained under duress and are therefore void.

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37. In addition to its major legal contentions on the question of aggressive war the defense has raised a large number of technicalities, most of which are patently of no validity. The attacks contained on the specific counts of the Indictment are based upon a degree of technicality without substance which can be found in modern times in few, if any, of the known modern systems of criminal law. The common sense test of a count in a criminal indictment -- the test which must and should be applied in International Law -- is does the count fairly inform the accused with what he is charged so that he may adequately defend himself. The defense do not claim that the counts of the indictment did not fully inform the accused of the charge against him. On the contrary they complain that the counts set forth too much. A count can never fail because it states too much. So long as all the essential elements of a crime are charged and proved, it is immaterial that other elements are alleged or proved. In any event such matters must be raised before plea or trial. As to many of the matters charged, no such application was made and such applications as were made were rejected by the Tribunal. There is likewise no foundation in law for the contention that the counts alleging that wars were both aggressive and

in breach of treaties, etc., can be sustained only if both allegations are proved. Either would be sufficient. Since the same facts establish both, it would have been only sheer wasteful duplication to state both separately with no practical benefit resulting to the defendants. Moreover, the question is entirely academic since, in fact, both allegations have been proved under all the evidence in the case. With respect to the contentions made as to the counts with reference to the wars against India, the Philippines, and the Mongolian Peoples Republic, these same contentions were raised in the original motions to dismiss and rejected by the Tribunal. The position of the prosecution was then stated[a] and need not be repeated here.

38. The technicalities of law raised by the defe e often enter into the realm of pure casuistry. For example, the argument in connection with the counts 51 and 52[a] that hostilities cannot occur during a time of peace and constitute a war of aggression is solely based on this type of reasoning. If two nations are at peace and if one of them attacks the other without warning, the attack is made upon a nation with which

37a. T. 265-272.
38a. Defense summation C. pp. 59-60.

the attacker is at peace. At the same time everyone must admit the attack is an act of war and that a state of war simultaneously comes into existence. If the purpose is aggressive, it is an act of aggressive war, and the war that thereupon comes into being is a war of aggression. There is therefore no inconsistency or fallacy in the prosecution contention. The only fallacy is that of the defense in attempting to give to the descriptive term "then at peace" a meaning it does not possess.

39. On the question of murder the defense accept the prosecution's definition with the "grave qualification" that an illegal killing is not necessarily murder even in Great Britain or the United States. This is of course no qualification since the only killings which are not deemed murder in those countries are thos that are unintentional and the prosecution's definition that murder is the intentional killing of a human being without legal justification takes care of the so-called qualification.

40. There seems to exist some confusion in the minds of the defense on the question of murder in this case. The Indictment deals with two categories of murder: (1) those murder counts with which the aggressive or unlawful nature of the war have nothing

to do, and (2) those in which the murder is the result of the aggression. (In dividing, for purposes of analysis, the murder counts into these two categories, we do not desire to leave the impression that a particular murder charged may not fall within the purview of both categories.) The first class is made up of the murders committed against prisoners of war and civilian internees, those covered by Sections 5b and c of the Charter. The aggressive nature of the war is completely immaterial in this category. If such murders take place even in a lawful war of self-defense, belligerency is no defense and these killings are punished as murder. Persons guilty of such crimes can be tried by either the offending country itself or by a military commission of the country of the victim. Since the crime is a violation of international law, it is an international crime and may be tried as such by an international tribunal.

41. The second category of murders includes all killings committed during the course of an aggressive war wherever they may take place, whether in combat, in the prisoner of war camp or in the civilian internment camp. The prosecution contention with respect to this category of murders is not at all complicated. It is the simple fact that aggressive war is murder. Intentional

killing is an integral part of war. In any war it is the intention of the parties that certain unspecified members of the armed forces of the opposing side should be killed. This intention takes effect when the actual killing takes place. There is, therefore, an intentional killing. Such a killing is murder unless there is a legal justification. The only legal justifications are self-defense or belligerency. In an aggressive war there can be no justification of self-defense, at least for those who plan, prepare, initiate and direct the war. Neither is belligerency a legal justification in that case. We have already seen that belligerency is not a justification for all murders committed during a war. It is not a defense to the killing of prisoners of war. It is likewise not a defense to killing in combat unless it is a lawful belligerency. There can be no lawful belligerency if the war is not lawful. An aggressive war is not lawful, it is itself a crime. A war in violation of treaties and other obligations is likewise not a lawful war. There is therefore no lawful belligerency. All killings committed during the course of an aggressive war committed during an illegal war and being without justification are murders. These murders being violations of international law are justiciable

before an International Tribunal.

42. In accordance with the basic philosophy expressed at the very outset of their argument, the defense summarily dispose of treaties, conventions and assurances as matters of no account. Treaties are not law; they impose no obligations; they do not mean what they say; and any party to them can at will nullify them. This is, of course, nihilism at its worst. We cannot subscribe to the defense doctrine that treaties are worthless scraps of paper, pious expressions of good will and mere fraudulent gestures. Treaties are solemn acts of government and are meant to have significance and force. We cannot assume that states enter into them with tongue in cheek, neither intending themselves to obey their mandates nor expecting others to obey them. This philosophy with respect to treaties is a natural corollary of the defense doctrine that war is inevitable and necessary. We have rejected the basic philosophy and we likewise must reject the corollary that flows from it. The defense propositions are supported by no one, least of all by the authorities they cite in justification of it.

43. The proposition that treaties are not law but are only sources of law is both misleading and inaccurate. Treaties are both law and a source

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43. The proposition that treaties are not law but are only sources of law is both misleading and inaccurate. Treaties are both law and a source

of law. As between the parties signatory to a treaty, the treaty is law and not a source of law. It imposes an obligation which binds the parties.[a] The courts of every civilized nation so regard them and enforce them in matters coming before them involving their application and enforcement. The Constitution of the United States expressly provides that treaties are part of the supreme law of the land. As between the parties the treaty imposes a binding obligation even though it is a departure from the existing customary law. Assuming that the customary law of warfare did not require the humane treatment of prisoners of war, if countries A and B enter into a treaty requiring that prisoners of war be treated humanely, then the obligations of A and B are determined not by the ancient customary law but by the treaty. Of course, the treaty is not binding law on parties not signatory to the treaty. However, at the same time, a treaty which is binding law on the parties signatory may be evidence as to the existence of a general principle of international law which is binding on all nations. In this capacity a treaty is a source of the law. The defense entirely overlook this vital dual character of a treaty. They treat it only in its character as a

43a. Oppenheim, Vol. 1, pp. 27 and 794.

source of the law and would have us forget that it is law binding upon its signatories. It is interesting to note that all their citations from the authorities are with reference to treaties as a source of the law and not one of them deals with the problem of treaties as laws binding upon the parties signatory.

44. Treaties have been used in both capacities in this trial. In order to ascertain the existence or non-existence of a principle of international law, they have been used as a source of the law. When used in this capacity the prosecution has recognized that they are not the only source of the law. However, the prosecution does contend that they are the best source as one of the authorities cited by the defense states "their true character can generally be appreciated; they are strong, concrete facts easily seized and easily understood."[a] However, where in the case the matter dealt with is a specific violation by Japan of a specific treaty to which Japan is a party signatory, we are not concerned with that treaty as a source of international law but are concerned with it as a law and obligation binding upon a party signatory.

45. The defense assert that treaties are only contractual. It is admitted that treaties are contractual in origin. They may and do create rules

44a. Hall, Treatise on International Law, 8th Edi, p. 11.

of conduct and legal obligations, the non-observance of which may be a crime. This is even true in domestic law. If one who does not stand in loco parentis to a child undertakes by contract the care of a child, that person is criminally liable for the death of that child if he fails to give it the necessary care and it dies as the result of such failure. With respect to assurances, the defense dismisses them as being made without consideration. It is amusing, in light of the defense charge that the prosecution is imposing Anglo-American law upon the Tribunal, to have the defense plead lack of consideration, a doctrine which is entirely peculiar to the Anglo-American law, particularly in view of the fact that in recent years Anglo-American courts have made large inroads into the doctrine. Assurances are solemn commitments of one nation to another. The giving of them or the refusal to give them often is the basis upon which another nation acts or fails to act in a given situation.

46. The defense assert that a treaty may cease to be effective and allege two grounds to support it. First, if a treaty is violated in a stipulation which is material to a main object, the violation liberates the party other than that committing the

breach from the obligations of the treaty. It should be noted that the breach does not make the treaty absolutely void. If it did, neither the violator nor the other party would be bound by it. Yet the rule states that the violator is still bound. The treaty is therefore only voidable. In other words the offended party has the election to determine whether the treaty shall continue in force or not. In order to show that a treaty was abrogated under this rule, it would have to be shown that the offended party had made such an election either by word or by act.

Second, it is contended that under the doctrine of sic stantibus a state is released from its treaty obligations by reason of an essential change of the circumstances under which the treaty was concluded. Here again the rescission of the treaty is not automatic. Westlake, upon whom the defense relies, does not state that the treaty is rescinded but that it is rescindable. In other words a change in circumstances will permit the parties to rescind if they so desire. In alleging a rescission, where no formal action has been taken by the parties, the burden rests upon the party claiming there has been a rescission to show both that the circumstances have changed and that the parties treated

46a. Westlake, International Law, 2nd Ed., p. 295-6.

breach from the obligations of the treaty. It should be noted that the breach does not make the treaty absolutely void. If it did, neither the violator nor the other party would be bound by it. Yet the rule states that the violator is still bound. The treaty is therefore only voidable. In other words the offended party has the election to determine whether the treaty shall continue in force or not. In order to show that a treaty was abrogated under this rule, it would have to be shown that the offended party had made such an election either by word or by act. Second, it is contended that under the doctrine of sic stantibus a state is released from its treaty obligations by reason of an essential change of the circumstances under which the treaty was concluded. Here again the rescission of the treaty is not automatic, Westlake, upon whom the defense relies, does not state that the treaty is rescinded but that it is rescindable.[a] In other words a change in circumstances will permit the parties to rescind if they so desire. In alleging a rescission, where no formal action has been taken by the parties, the burden rests upon the party claiming there has been a rescission to show both that the circumstances have changed and that the parties treated

46a. Westlake, International Law, 2nd Ed., p. 295-6.

the treaty as rescinded.

47. The defense argue that the rule of sic stantibus applies to the Nine-Power Treaty. Assuming that the conditions had changed which would permit a rescission of the treaty, a fact which the prosecution denies, there is no evidence that the treaty was ever rescinded. The fact is that the evidence shows that when the United States asked Japan whether it was disposed to get rid of the Washington Treaties, Japan replied that it was not disposed to denounce and abrogate them.[a] Under such circumstances one can hardly claim that the treaty was rescinded.

48. The defense likewise contend that Hague Convention III was inapplicable because of both of these rules. In this instance violation by the parties is alleged as the change in circumstances so that the two rules are in effect the same. What is the evidence that the parties violated the treaty? In the first place they point out certain acts of Japan, Germany and Italy. However, these are the states whose actions are the subject of the charges. The argument is that a law-breaker, if he breaks the law often enough can thereby change it or interpret it to suit his convenience. We may well ask the same question posed by the British

47a. Ex. 937, T. 9395, 9401-2.

prosecutor at Nuernberg--"Since when has the civilized world accepted the principle that the temporary impunity of the criminal not only deprives the law of its binding force but legalizes his crime?" In the second place they allege that it was broken by the United States, Great Britain and by the Soviet Union in 1929. In all of these cases the matter is in dispute and has never been determined by any international body. The Tribunal would have to investigate these matters in detail, which it has no jurisdiction to do, before they could be used either as an interpretation or reason for disregarding the Convention. Third, they allege an action by a nation which was condemned by the League of Nations for that action. This would tend to show that the general consensus of opinion treated the Convention as obligatory. Lastly, they allege the action of the Soviet Union in 1945, where the evidence shows notice was given although it is alleged that it did not reach Tokyo. This could not in any case affect the law in 1941. The defense contention therefore fails in all respects.

49. With respect to Hague Convention III the defense assert that it imposes no rule, the breach of which could constitute a crime. To reach this result they must find an ambiguity in the Convention.

This they are able to do only by amending the official English translation, which has existed for forty years, by changing the word "must" to "ought" although complaining bitterly because the prosecution has used the word "shall" in one instance in a paraphrase. This can be accomplished only if the word "doivent" in the French text can be given an hortatory meaning instead of an obligatory one. It is respectfully submitted that the use of the word "doivent," the present indicative carries only the imperative meaning of obligation contained in the English word "must." If the hortatory meaning of "ought" had been intended the proper word in the French text would be "devraient." The imperative "must" is the official translation, however, in the official report of the Hague Conference leader and Reporter, Louis Renault, as stated in Reports to the Hague Conferences of 1899 and 1907 (1917) 502. By this verb the forty-five participating nations have made Hague III a categorical imperative, a definite command, creating a legal duty and obligation.[49a] Furthermore, Article 3 provides that "Article I shall take effect in case of war between two or more of the

49a. Oppenheim, International Law (5th Ed. 1944) Vol. II, Section 96, first sentence; Hershey, Essentials of International Public Law (1939) 562.

Contracting Powers."[b] If there were no obligation under the first article, the third article becomes meaningless. If there were any ambiguity in the wording of Article 1, it is completely removed by the plain meaning of Article 3.

49-A. The defense further attack the language of Hague III by calling it merely "a statement of policy" which "did not seriously effect the previous law." In citing Westlake for this proposition the defense overlooked the fact that Westlake subscribed to the view of Grotius that international law, even prior to Hague III, required a declaration of war before commencing hostilities. Other authorities held that Hague III changed existing law and therefore was "a real piece of international legislation."[a] Westlake's statement therefore does not support the defense view that a declaration of war is not necessary under the law. The defense erroneously attack Hague III also by stating that the purposes or functions underlying Hague III did not apply to the Pearl Harbor attack. The defense overlooked, however, the reason stated by Grotius for requiring a declaration of war, namely,

49b. Ex. 14, p. 3.
49-A-a. Stowell, Convention Relative to the Opening of Hostilities, 2 American Journal of International Law (1908) 50, at p. 60.

"that it might appear with certainty that the war was not waged by private audacity, but by the will of the peoples on either side, or their heads."[b] It is clear that Hague III is not obsolete but is an increasingly valuable safeguard that modern wars shall be begun only "by the will of the people" concerned and not "by private audacity" of irresponsible militarists who, by misrepresentations and concealment of their reasons, and by dictatorial usurpation of governmental power, throw the people of their country into totalitarian war. An additional reason for upholding Hague III was forcefully presented by the Russian proponents of the treaty at the Hague Conference in urging the Conference to make the treaty still stronger in order to relieve the people of the tax burdens of maintaining armaments on an emergency basis against possible surprise attacks.[c] Hague III was unanimously supported by the forty-five nations represented at the Hague Conference of 1907, and it was the only general convention of the thirteen conventions approved by that Conference which was adopted without any reservations whatsoever. Such popular international

49-A-b. Grotius, 3.3.11, quoted in Westlake, International Law (2d Ed., 1913) 20.

49-A-c. The Reports of the Hague Conference of 1899 and 1907 (1917) 502, and Deuxieme Conference Internationale de la Paix Actes et Documents (Lay H[illegible]), Tome III, pages 163-179.

legislation demands full respect as existing law until it is legally denounced or abrogated by the governments and peoples who made it their law. Defense counsel, in condemning the surprise attack aspects of the Treaty, overlook the fact that probably the greatest significance of Hague III is in its governmental, legal, procedural and popular attributes, rather than in its operational provisions for armed hostilities. In other words, the defendants violated Hague III at Tokyo and many other places in addition to Pearl Harbor, and against their own Japanese people as well as other peoples.

50. At this late stage the defense raises the point that Hague Convention IV is not binding by reason of Article 2, the "general non-participation clause," and the fact that Italy, Greece, Bulgaria, Yugoslavia and several unspecified Lation American states did not ratify it. If by this argument, the defense is contending that Japan was not bound to obey the rules of warfare with respect to the treatment of prisoners of war and civilian internees, then its argument is wholly untenable for many reasons. In the first place no such contention was raised by the accused or anyone on behalf of Japan during the progress of the war, though they had every opportunity of knowing these facts. If they did not consider themselves bound

by the Convention they should have said so. In the second place, Article 4 provides:

"The present Convention, duly ratified, shall as between the Contracting Powers, be substituted for the Convention of the 29th July, 1899, respecting the Laws and Customs of War on Land.

"The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention."

Italy, Greece, Bulgaria and the states which formed Yugoslavia as well as Germany, Belgium, France, Great Britain, the Netherlands, Siam, Portugal, Russia, the United States and Japan and others all ratified the Convention of 1899.[a] While the 1899 Convention does not contain the preamble and compensation clause of Hague IV, the annexed regulations are the same with a few minor verbal alterations which are of no material importance. Third, the powers expressly stated that their purpose in Hague Convention IV was to "revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible." Is it the defense contention

50a. Malloy, Treaties etc. between the United States and Other Powers, Vol. II, pp. 2042-57.

as it seems to be, that it was the intention of the drafters of the Convention that the laws and customs of war as they had theretofore existed should be completely abolished? The care which these drafters took to preserve the Convention of 1899 with respect to the powers who did not ratify the new Convention would indicate to the contrary. Is it to be even imagined that a group which was interested in greater precision and mitigation of severity intended to leave the situation worse than it found it? If Hague Convention IV is itself not binding, the customary laws and customs of war are binding and Hague IV is in itself evidence of what those customary laws and customs had come to be by the time of the events of this case. This is the view taken at Nuernberg.[b] Finally, Japan did accept the Geneva Convention of 1929 mutatis mutandis, a matter which has been fully discussed by the prosecution.

50b. Nuernberg Judgment, p. 83.

51. When they come to their section on the law of conspiracy, the defense exhibit a great deal of confusion of thought and an utter misconception of the law of conspiracy and the prosecution's contentions with respect thereto. The prosecution has not contended for the application of the Anglo-American rules as to the scope of conspiracy. The prosecution contends and has demonstrated that the offense of conspiracy is recognized by the law of all civilized nations. It recognizes that the scope of the matters which may be the objects of a criminal conspiracy is wider in some countries than in others. However, for the purposes of this case it is not necessary to extend that scope beyond the very narrowest which is recognized by every country -- a conspiracy against the peace and security of the state. Being a general rule recognized by all civilized nations, it is at the same time a principle of international law. A conspiracy against the peace and security of the family of nations (the international community) is therefore an international crime. A conspiracy to wage a war of aggression or a war in violation of treaties is a conspiracy against the peace and security of the international community. Further than this the Tribunal need not go although it would

be amply justified in holding that since a conspiracy for the taking of human life is recognized as a crime by most nations, such a conspiracy is likewise a crime in international law and that a conspiracy to wage aggressive war was also a crime because it is a conspiracy to take human life. The correlation of the domestic crime of conspiracy against the peace and order of the state and the international crime of conspiracy to wage aggressive war is no superficial analogy. They are exact counterparts of each other within their respective fields. On the contrary, it is superficial for the defense to contend that since these men acted for what they believed to be the highest good of Japan, that it is heinous to liken their actions to treason. Motive does not enter into the matter in any way whatsoever. Many men who have committed treason, the supreme crime against the security of the state, have done so firmly believing that what they were doing was holy and was for the good of the state. Nevertheless they have committed treason because they are guilty of having disturbed the peace or security of the state. Motives are likewise immaterial with respect to the international crime. The real test is whether, regardless of motive, the

accused intended to disturb the peace and security of the international community.

52. It is not without good reason that each of the civilized nations of the world have come to an independent conclusion that a conspiracy against the peace and security of the state is a crime. Usually, crimes against the peace and security of a national state are not the acts of one individual and cannot be carried out by one individual alone, but are, on the contrary, the acts of several acting conjointly to accomplish the criminal purpose. The primary danger to the peace and security of the state lies therefore in the joining or banding together for the criminal purpose against the peace and security of the state. The joining together of those with similar criminal intent enhances the danger of the successful completion of the act of treason or the coup d'etat or other acts against the peace and security of the state. It is this enhancement of the danger which makes the joining together a crime in itself. If this be true with respect to crimes against peace and security of a nation, it is infinitely all the more true with respect to aggressive war, the international crime. While a crime against the peace and security of

one state may in rare instances be carried out by one individual, the international crime of aggressive war cannot be carried out by one individual. The scope of the project is always too huge to permit one individual to carry it out alone. In carrying out an aggressive war there is involved the control of the government, the molding of public opinion, the use of the police power, industry and finance for the purposes of war, the preparations of munitions and war materials, the building, equipping and training of armed forces to act over a wide geographical area and the preparation and execution of the plans of war itself. This cannot be done by any single individual. Even Hitler with his vast dictatorial powers, the Nuernberg Tribunal found, could not have carried out Germany's aggressive wars alone. Conjoinder is therefore of the very essence of the crime of aggressive war. It is the joining together which makes possible the execution of the ultimate crime. It is the joining together which is the basic danger against which the law of conspiracy must protect.

THE PRESIDENT: Mr. Horwitz, I think this is a convenient time to recess. We will recess for fifteen minutes.

(Whereupon, at 1345, a recess was taken until 1400, after which the proceedings were resumed as follows:)

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MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Mr. Horwitz.

MR. HORWITZ: 53. Conspiracy does not, therefore, make a crime of the act of meditation about a crime as the defense allege. A man may meditate all he desires about a crime and he will not be guilty. He may meditate alone or he may do it together with others. With others he may discuss the advisability or inadvisability of committing the crime or its possibility or impossibility. So long as he does not cross the line and join and agree with the others to do the crime he is guilty of no crime. But once he crosses that line and joins with others in a common undertaking to carry out the criminal act he is a conspirator and the crime of conspiracy has been committed. The essence of the offense is the joint agreement, the joint undertaking. Whether or not he has crossed the line from "meditation" to joinder in an agreement or common undertaking is of course a question of fact for the trier of the fact. This may not always be an easy question to decide. It is this fact which has prompted certain American jurisdictions to require by statute that an overt act be shown in order to establish a conspiracy.

The only purpose for which those jurisdictions require an overt act to be shown is to ensure that there is ample evidence that the line between meditation and joint undertaking has been crossed. We need only examine the nature of the act required to show that this is the case. The act required does not amount to the dignity of the act required to sustain a conviction for an attempt to commit a crime. It is any act which is in furtherance of the conspiracy. It need not be a criminal act; it need not be an illegal act; it need not be an act of any importance; it need not be performed by more than one of the conspirators. In the case of a conspiracy to murder a sufficient overt act is shown if it is shown that one of the conspirators has lawfully or unlawfully purchased a revolver. In the case of a conspiracy to rob a bank it is sufficient to show that pursuant to the common agreement the conspirators have provided themselves with a diagram of the various entrances and exits to the bank. In the case of a conspiracy to seize the government of the United States, the requirement of an overt act would be sufficiently fulfilled by showing that pursuant to the conspiracy the conspirators had drafted a plan of the White House or were watching the movements of the President

or that one of them was making a speech. The sole purpose of requiring the overt act is to ensure that there is sufficient evidence that a conspiracy has actually been entered into. Any single one of the thousands of acts by any one of these defendants or by any one of their co-conspirators would meet the requirements of an overt act necessary to establish a conspiracy in those jurisdictions where it is required.

54. The defense next shift their ground of attack on the conspiracy charges and claim that the conspiracies are merged into the substantive offenses. They allege that in all jurisdictions except the Anglo-American there is a merger of the conspiracy into the crime itself if the crime is completed and that there could not then be a separate conviction for the conspiracy. It should be noted that the Nuernberg Tribunal did not support this contention. While it did not discuss the problem, it did convict on both the conspiracy and the substantive counts although it recognized that there was sufficient identity between them to allow for their joint discussion by the Tribunal. However, even aside from the Nuernberg holding, the doctrine of merger has no application in the conspiracies in the present

proceeding. Merger of one crime into another can take place in the law only if the elements of the merged crime are all identical with all or some of the elements in the final crime. If that identity is missing in any particular there can be no merger. In the case of a conspiracy to commit a single crime, it makes no practical difference whether the conspiracy is said to be merged in the substantive crime when it is committed. The same might be said with respect to a conspiracy to commit several crimes where all the several crimes are thereafter committed. But what about the case where the conspiracy is to commit several crimes and not all the planned crimes are committed? In that event there can be no merger. If there is a conspiracy to murder A, B, C and D and only A and B are thereafter murdered, there can be no merger of the conspiracy with the substantive crimes. Likewise there must be identity of parties defendant in both the conspiracy and the substantive offense before there can be merger. In the example given above, if X a party conspirator withdraws from the conspiracy after A and B are killed and thereafter C and D are killed by the remaining conspirators, there can be no merger. If therefore all the crimes charged as the object of the conspiracy are not charged as

substantive offenses or even if they are so charged, if the Court finds that any one of them has not been proved, or if all the defendants charged in the conspiracy are not charged with respect to each of the substantive counts, or if the Court should find for some reason that one defendant guilty of the conspiracy was not guilty on one of the substantive counts, there can be no merger.

55. The defense also attack the principle that a co-conspirator is liable for the substantive offenses which any of the conspirators commit on the ground that it imposes vicarious liability. This is manifestly unsound. All nations recognize the principle of co-participation in crime as laid down in Article 5 of the Charter. All nations recognize that persons other than those who commit an act which is a crime may be responsible for it and may be convicted of it. Persons who may be so convicted are convicted because they are co-participators. These include instigators, perpetrators, organizers, aiders, abettors, accessories before and after the fact, in short all are accomplices of the person committing the crime. To hold that a conspirator is liable for crimes committed by his co-conspirator adds no new element to the universal rules of co-participation.

Since the essence of conspiracy is co-participation, a conspirator immediately upon joining becomes a participator. The moment a conspirator joins a conspiracy, if he takes no further action, he becomes an aider or abettor or an accessory before the fact to the crimes then being contemplated and thereafter committed. In other words the conspirator becomes an accomplice to the substantive offenses as soon as he joins the conspiracy. To state the matter in a different way, all accomplices are not conspirators but all conspirators are accomplices. The conspiracy rule of liability for the substantive offenses adds no vicarious liability.

56. The defense attempt to attain comfort from the language of the Nuernberg decision with respect to conspiracy. Yet there is nothing in the conspiracy before this Tribunal which does not fit the test laid down by the Nuernberg Tribunal. If we apply the materials that are before this Court to the tests laid down by Nuernberg, we find that the evidence in this case meets those tests in every respect. The conspiracy is completely outlined in its criminal purpose. The evidence shows conclusively that the criminal purpose was to wage aggressive wars against China, the Western Powers and the Soviet

Union and any other nation for the purpose of obtaining domination and control of East Asia and the South Seas. It is not too far removed from the time of decision and of action. The prosecution has not attempted, as it might have, to show that the conspiracy was in existence among certain of the conspirators many years before. It has shown the existence of the conspiracy in the period immediately preceding the first aggressive move on September 18, 1931. It has shown that from that time onward it was carried forward on an ever-expanding scale until the final surrender in 1945. The proof of criminal planning does not rest on declarations of party programs. It rests entirely on official government acts, statements and plans. Continued planning under a concrete plan to wage aggressive war as the objective was shown to exist throughout the whole period of the conspiracy.

57. The defense at this late stage attack Counts 1 to 5 of the Indictment as being faulty. A careful reading of the Counts will immediately show that the statement that they charge nothing more than a conspiracy to dominate is obviously incorrect. Following the exact language of the Charter they charge, as in the case at Nuernberg, a conspiracy

to wage declared or undeclared wars of aggression and also contain a statement of the object of such wars. Technically, no doubt the additional statements as to the object of the conspiracy to wage aggressive wars are unnecessary. The charge is complete without them. The reason for inserting them was for the purpose of showing wherein the wars were aggressive by stating the object and purpose of the wars, the elements which determine the aggressive nature of the wars. It is of course always open to the Tribunal to ignore as surplusage any words deemed by them as unnecessary to the charge, if it deems it advisable.

58. With respect to the defense charge that no common plan has been shown, the prosecution has already shown the existence of the common plan at some length and in detail in Section D to I, inclusive. We shall not attempt to repeat it here. The defense points out that there are differences between the case here and the case at Nuernberg. Admittedly, there were differences. Conspiracies differ according to the nature of the conspirators and of the conspiracy itself. But the defense fails to point out the most significant difference. The conspiracy in Germany was simple, bold and avowed.

Here the conspiracy is extremely complicated with many ramifications and is inextricably involved in every event throughout the period under discussion. Here it was part of the common plan to hide the common plan. It is the common plan and design which gives meaning and significance to every event, to every act that took place from the moment Japan's military forces first moved into aggressive action. If one merely lists chronologically all the acts and events which go to make up Japanese history from 1928 to 1945, which have been presented in evidence, the common plan is at once seen to run as a giant thread through all of them binding them together into one common whole. From the beginning the original conspirators in the army had one overall plan which they continuously put into practice. They were strong enough from the very beginning to force the government to acquiesce and participate with them in every individual act. Failure to participate and acquiesce brought the downfall of the recalcitrant cabinet and the installation of a new one which would participate at least to the extent of the portion of the plan then being put into effect. Finally in 1936 the conspirators became powerful enough to obtain as the price for allowing a govern-

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ment to be formed, the complete participation by the government in the conspiracy, and the common plan became the national policy of Japan. This policy was never repudiated by any succeeding cabinet. On the contrary each and every succeeding government carried the program one step forward. Every event of any significance in Japan during the entire period bore definite relation to the common plan. Every change of cabinet has been shown by the evidence to have been a concrete and planned step by the conspirators in furtherance of their common plan. The points which the defense raise do not show the absence of any common plan. They show only that not all the conspirators are in the dock. With this the prosecution agrees. It is, however, an immaterial consideration as it is in any criminal trial.

Mr. Tavenner will now conclude for the prosecution.

THE PRESIDENT: Mr. Tavenner.

MR. TAVENNER: If the Tribunal please.

C. The Affirmative Defenses.

59. For the most part the defenses offered affirmatively are personal defenses. However, there is one defense that has been offered on behalf of all the defendants which goes to the existence of the crime itself. This is that all of Japan's wars from 1931 to 1945 were not wars of aggression but were in fact wars of self-defense. The proposition is stated in many forms and in various guises, but in each instance the basic underlying contention is self-defense.

60. The defense is raised for the first time with respect to the wars in China. The contention is that conditions in China were so chaotic and unsettled that they had become a menace to Japanese rights in that portion of China known as Manchuria. This contention both begins and ends at this point although it is neither the beginning nor the end. It entirely overlooks the fact that the conditions complained of were nothing new. It was the existence of these unsettled conditions attendant on China's

emergence as a modern state, making China an easy prey for an aggressor, that had led the other powers in a series of treaties culminating in the Nine-Power Treaty, to which Japan was a signatory, to guarantee the sovereignty and territorial integrity of China. To get around this obvious fact the defense propound a most ridiculous argument that China, the object of the treaty, had forfeited the right to the protection given by the Nine-Power Treaty. While the thesis is too absurd on its face to require refutation, it should be noted that this contention was not new. The same point that China was not a nation entitled to the protection given to nations was in fact raised before the Lytton Commission in 1932. At that time the Commission pointed out that this had not been the attitude taken by any power, including Japan, at the Washington Conference, and that there had been considerable improvement by 1932 in China's political condition over what the situation had been at the time of the Washington Conference.[a] We must therefore recognize that the so-called menace to Japan because of conditions in China was not as great in September 1931 as it had been in 1921 when Japan became a party to the guarantee of China's integrity.

60a. Ex. 57, p. 17.

61. Not only does the contention fail to measure the full import of events which preceded September 18, 1931, but it stops short without meeting the really vital issues in this portion of the case which only begin where this proposition of the defense ceases. It in no way answers the really important matter whether this so-called menace forced Japan to take military action to meet it or whether the so-called menace was used as a pretext by Japan for the purpose of separating from China a portion of her territory through the use of military force. This defense thus ignores the fact, as shown by the evidence, that the Japanese had planned to carry out military operations on a large scale using as a pretext any incident that might occur and that they carried out this program completely.[a] It ignores the fact, as shown by the evidence, that the Japanese did not wait to put this program into practice until an incident occurred in the normal course of events but themselves planned and created the incident which was used as the pretext.[b] The summation of this contention, therefore, moves the defendants' cause not one step forward.

61a. Prosecution Summation D-17 to D-27, T. 39084-97; D-39 to D-47, Tr. 39115-28; D-51 to D-53, Tr. 39132-35.

61b. Prosecution Summation D-27 to D-38, Tr. 38097-111.

62. Furthermore, this defense is asserted without taking into consideration one of the cardinal principles of the law of self-defense. The law does permit the use of force as a measure of self-defense but it does not permit the use of unlimited or excessive force. The law permits in self-defense only the use of such force as is commensurate with the danger involved and necessary to protect against it. If the force used exceeds that allowed by the law, the defense of self-defense fails. The use of a gun against the attack of a small child is not self-defense. A man may be privileged to break into an adjoining neighbor's house to put out a fire when that neighbor is absent in order to protect his own property, but he may not use that privilege to justify his looting all that is in that house or his keeping possession of the house itself. This principle has been recognized with respect to self-defense in international law. In the Caroline Case, Secretary of State Webster said that in order to show self-defense one would have to show "necessity of self-defense, instant, overwhelming and leaving no choice of means and no moment for deliberation" and that "the act justified by the necessity of self-defense must be limited by that necessity and kept

clearly within it."[a] Before Japan and these accused can be exculpated on the grounds of self-defense, they must show that the force used was commensurate with the danger faced and necessary to protect against it. Since the Japanese interests in Manchuria, although valuable as well as disputed, were limited and were for the most part contained in a narrow corridor in the southern portion, was it commensurate with the danger and necessary to protect those interests for the Japanese to conduct military operations throughout all Manchuria and to occupy by military force the whole of the great area of Manchuria? Was it commensurate and necessary for that same military force with the aid of the Japanese Government to separate that area from China and make it in fact, if not in name, Japanese territory? The League of Nations unanimously after thorough investigation answered both of these questions in the negative. They went even further and held that the military operations carried out on the night of September 18, 1931 by the Japanese at Mukden and other places in Manchuria could not be regarded as

62a. Hershey, "The Essential of International Public Law and Organization," p. 233; Oppenheim, Vol. I, Sec. 130.

measures of self-defense.[b] No reason has been advanced and no evidence has been produced to show why this considered finding of this international body should not be confirmed. In fact, the other evidence in the case confirms it.

63. The same defense is repeated with respect to the hostilities with China which began in July 1937. It has already been pointed out earlier in this reply that this particular defense contention fails for want of proof since it is based almost wholly on materials not in evidence. Even if it could be established, it faces the same stumbling blocks which invalidated the contention with respect to the first hostilities. It again fails to meet the basic question did the alleged menace from the Chinese situation force the Japanese to take military action to meet it or was it used as a pretext by Japan to acquire control of more Chinese territory through the use of military force. No attention is paid to any of the government documents in evidence which clearly reveal Japan's intention and policy to take over control of the Asiatic continent and the South Seas. Assuming that this so-called menace had been proved, once again this

62b. Ex. 57, p. 18.

defense must be measured in terms of the extent of the military force applied. Was it commensurate with the so-called danger and necessary to the protection of the limited rights which Japan possessed, that Japan should by military force occupy all of the eastern coast of China, that she should occupy with military force large areas in the interior of China, that she should occupy French Indo-China and that she should wage unlimited warfare against all the Chinese? Was it commensurate and necessary that she make of China a totally subservient satellite of Japan?

64. Self-defense is again pleaded with respect to the wars against the Western Powers in 1941. This time it is accompanied by a very amazing corollary that Japan was provoked into a war of self-defense. The defense have offered evidence along several lines to establish this proposition. Each of the so-called types of proof fails to establish either that the Pacific War was in self-defense or that Japan was provoked into it. In the first instance the defense state that Japan was provoked into it. In the first instance the defense state that Japan was forced to go to war because she was faced by economic strangulation due

to the cancellation of the United States-Japan Commercial Treaty, the embargoes on exports to Japan and the freezing of Japanese assets. This thesis, if it is at all tenable, can be established only if the series of economic measures are considered by themselves alone as though they existed in a vacuum and were unrelated to any of the other events that were occurring. These measures cannot be measured except against the background in which they took place, not only in the United States but in Europe and Asia as well. They must be considered with respect to the war then going on between Japan and China and the European War with reference to both of which they were imposed. In the opening to our final argument we pointed out in great detail the exact relationship between these measures and the two great conflicts.[a] We there showed that these measures were not imposed in a vacuum upon an innocent clean-handed unsuspecting Japan, but were taken after a long period of patient waiting in answer to the continuing aggression of Japan in an effort to stop that aggression. We there also showed that during the period of the embargoes the United States was providing for her own self-defense against the

64a. Prosecution Summation G-154, Tr. 39704-6.

even more serious threat from Hitlerite Germany. Notwithstanding the fact that this was pointed out in anticipation of this very argument of the defense, the defense have again completely ignored these basic facts and merely reiterated their often repeated contention. Their silence, after having the matter called to their attention, speaks louder than even a verbal acquiescence.

65. The defense contend that these restrictions constituted a blockade. This is manifestly unsound. A "blockade" is defined in international law as "the blocking by men of war of the approach to the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all nations."[a] None of the alleged acts fall within this definition. If these measures can at all be characterized as measures other than measures in defense of the United States, they are economic sanctions imposed against an aggressor. As such they are recognized as legitimate measures to be imposed by international law. Article XVI of the Covenant of the League of Nations had expressly recognized the principle that a war of aggression was an act of war

65a. Oppenheim, Vol. II, p. 628.

against the international community and that the individual nations had the right to impose not only economic sanctions but also military sanctions against the aggressor. Japan herself had given sanction to this principle by becoming a signatory to the Covenant and a member of the League, and she had come to oppose it only after she had become an aggressor. The complaint that Japan was provoked into war by reason of economic strangulation by measures recognized as lawful acts of restraint upon an aggressor is strongly reminiscent of the convicted criminal, who having been sentenced to the penitentiary, alleges that he has been unlawfully deprived of his freedom of action.

66. The second contention is that the A, B, C, D powers took certain actions of a military nature which were directed against Japan. In this connection we wish to point out that the prosecution does not, as stated by the defense, accept the defense data with respect to the military and naval preparations of the United States. The prosecution made it unmistakably clear at the time the defense evidence was introduced that the comparative statistics on naval strength in the Pacific introduced by the defense were highly misleading.[a] In rebuttal the prosecution introduced into evidence the exact figures of the United States Navy on its own naval strength in the Pacific.[b] To take one example alone, the United States Navy had on hand only six carriers completed, equipped and ready for operational service with a total tonnage of 134,800 tons instead of the alleged eight carriers with an alleged tonnage of 162,000.[c] Hence the United States had considerably less than the total Japanese aircraft tonnage of 152,970 tons.* When the prosecution has used the defense statistics it has been because the fallacy of the defense contention could be shown by the defense's

66a. T. 26,635-6
b. Ex. 3838-A, T. 38,098
c. Ex. 3838, T. 38,098-9
Ex. 3838-E, T. 38,108

*Particularly in the Pacific the United States had only three carriers, total tonnage 85,800 tons, as against Japan's ten carriers and 152,970 tons.

own evidence as well as by the prosecution evidence. The vital fallacy in the defense argument on these various military measures has already been illustrated in our opening of the final arguments, and nothing has been pointed out by the defense to show that that fallacy did not continue to exist. These military measures must be seen, as were the economic sanctions, against the backgrounds of the wars then raging. The military measures cannot even be regarded as sanctions in the same sense as the economic measures. At the most they can be regarded only as a type of moral sanction because of the restraint against aggression which the preparedness of the victim and the knowledge of that preparedness puts upon the aggressor not to begin his aggression.

67. As further proof of their plea of self-defense, the defense contend that the United States did not negotiate in good faith with Japan. To establish this proposition the author of this section of the defense argument stated to the Court that he would approach the problem with the utmost detachment. He has kept his pledge faithfully. He has detached the entire subject of negotiations from the whole structure of which it is an undetachable part. He has detached

particular sentences from the rest of a document. This process is of no assistance in finding the solution to the problem. These negotiations were not the negotiations of a simple business transaction with the parties disputing about the provisions of particular clauses. There was in these negotiations something much more fundamental than the wording of particular clauses and particular sections. The real significance of the negotiations lay in the things that the parties were bargaining for. Japan was not bargaining for peace; she had no need to do so. There was no threat or prospect of the United States, Britain or the Netherlands making war upon Japan unless they were forced to do so by Japan's aggression against them. Not one of the accused for a moment imagined that there was. Japan was trying to buy oil and other commodities, some of which were needed to some extent for purposes of peace, but all of which were needed to a greater extent for war. If Japan was concerned with peace at all it was to stop the war in China while retaining as much as possible of the fruits of that war or to extend them. Japan's object was to agree with the United States on terms of peace for the war in China, which would leave Japan with the benefits, and then to have the United States and Britain enforce them upon China by

threatening to withdraw their assistance and to leave her to her fate if she did not accept. If China did not accept the terms which violated her sovereignty and integrity, Japan would continue fighting her. Only this time China would be bereft of such help as she had formerly had against Japanese aggression, and Japan would be receiving the very munitions and materials which had formerly gone to aid China in her aggression against China. Was it bad faith for the United States to see through the negotiations to this fundamental purpose of Japan? Was it bad faith therefore for the United States to search each new offer to see whether there had been any real deviation from this diabolical scheme?

68. On the other hand the United States was trying to obtain from Japan nothing but the cessation of Japanese aggression actual or threatened. She wanted only that Japan stop her aggression in China and French Indo-China and that Japan withdraw her troops from where they had no right to be. She wanted Japan to cease being a threat to her rear in case she was forced into the European War. Neither Britain nor the Netherlands wanted anything but peace with Japan and that Japan stop threatening their possessions in the Far East and stop rendering assistance to Germany, with

whom these nations were at war, for by this threat of war with Japan they were compelled to dissipate their forces which might otherwise be used elsewhere.

69. The defense contend that the United States mistook the sincerity of Japan because it was misled by the intercepted messages. We shall not take up the time of the Tribunal to point out the numerous instances of indicated differences between the intercepts and the original instructions which show in fact no differences at all. We merely point out that Admiral NOMURA, who received the originals, who had the actual code itself and who was, of course, fluent in the Japanese language as only an educated Japanese can be, received exactly the same impression from the originals that Secretary Hull obtained from the intercepts. It was Admiral NOMURA, the Japanese Ambassador, who wanted to resign because he did not desire to be involved in a hypocritical situation deceiving himself and others.

70. The defense would have us believe that there was something shameful in the United States continuing the negotiations while believing Japan insincere. Is there anything shameful in continuing negotiations in the hope that Japan might change her attitude

69a. Ex. 1161, T. 10,312-3

even if that hope was infinitesimal? The defense allege that the United States continued negotiations to keep off war as long as possible until she was better prepared. A victim does not lose his right of self-defense because he attempts to dissuade the aggressor or to put off the aggressor's attack until the victim is better prepared to meet the attack.

71. In our opening argument of the final summation we posited one single question to determine whether this plea of self-defense could be sustained, namely, "What could the United States, Britain and the Netherlands gain from going to war with Japan?" No answer has been given to this question by the defense to refute the answer of the prosecution that they had nothing to gain except the right to keep what they already had and which they had a right to retain. Yet this is the vital question which determines the validity of the defense plea. Wars are not fought in this day and age for the mere pleasure of fighting. They are fought for some purpose. They are fought to obtain something which the nation has no right to take, in which event they are wars of aggression; or they are fought to retain or protect what a nation has and has a right to retain, in which event they are wars of self-defense. If we apply the test, only Japan had

something to gain from a war with the Western Powers. The defense have presented no answer to this question. They have avoided and ignored this problem. They have done so because under all the evidence, including that offered by the defense, there can be no answer other than the one given by the prosecution. Any attempt to have answered it would have led solely and inevitably to a repudiation of the plea of self-defense.

MR. LEVIN: May it please the Tribunal, I desire to object to that portion of the personal defenses that relates to KAYA and SUZUKI in paragraph 90 at page 106. The rebuttal is given in relation to SUZUKI -- to KAYA. I desire to state that that is not a rebuttal at all.

THE PRESIDENT: Mr. Levin, it is the desire of the Tribunal, I don't think there are any exceptions, that this reply should be delivered without any interruptions.

MR. LEVIN: Mr. President, I do not desire to fail to acquiesce in any desire on the part of the Tribunal, but it does seem to us that this being confined to rebuttal that we should be permitted at least to state our objection in relation thereto. I would like to state that objection for the record.

THE PRESIDENT: Mr. Tavenner.

MR. TAVENNER: If the Tribunal please. It is a strong argument, but it is proper reply or rebuttal in view of the fact that it shows the conflicts with the defendant KAYA's position and his testimony.

MR. LEVIN: May I be permitted --

THE PRESIDENT: Proceed to read your reply, Mr. Tavenner.

MR. TAVENNER: D. The Personal Defenses.

72. With the failure of the attempt to interpose self-defense as a justification, the defendants abandon all efforts to justify the criminal acts committed, and assert certain personal defenses against their liability for the criminal acts committed. Although the personal defenses advanced are many and varied they readily fall into a two-fold pattern. On the one hand where it is completely impossible to escape personal responsibility, they assert that they had no criminal intent. On the other hand wherever at all possible, they deny any and all personal responsibility for the acts committed. In both cases they have failed in all respects.

73. In order to show that the defendants had no criminal intent the defense relies upon the proposition that these men hated war and desired only peace. To establish this proposition they point to a number

of speeches and statements which reflect this great hatred for war and this overwhelming desire for peace. But these statements are the same pious statements which were used to beguile, deceive, and mislead the ambassadors and heads of other nations. These statements have been shown to have been part of the common plan which the defendants carried out. These statements were themselves part of the criminal acts committed. They, therefore, show neither any great hatred of war and love of peace nor any absence of criminal intent. In order to show HATA's great desire for peace the defense point to the testimony of SAWADA that HATA and the General Staff reduced the Japanese forces in China to 600,000 to 650,000 men.[a] How the withdrawal of excess forces which are strategically and tactically unnecessary to a battle campaign indicates a hatred of war has never been explained. The important point is that the war continued to be carried on while HATA was War Minister. Furthermore, the testimony of this same SAWADA showed that if HATA wanted to make peace with China it was because he and the Army believed that they could bring the war to a close and retain all the fruits of the war through German influence and power enhanced by Germany's dazzling victories.[b] HATA,

a. Defense summation N4, p. 30, T. 43,296
b. Ex. 3205, T. 29,009

therefore, merely wanted to bring the war to a close because its purpose could be obtained without it. This proves no great hatred of war or love of peace.

74. With respect to the Pacific War some of the defendants, particularly KAYA and TOGO, assert that although they voted for war, they didn't want it and they hated it. Both KAYA and TOGO produce evidence to show that as a condition of their joining the TOJO Cabinet they had obtained TOJO's assurance that the mission of the Cabinet was to work zealously for a peaceful solution. So strong was this desire for peace that in less than three weeks after they had become members of the Cabinet, they had joined with the other members of the Imperial Conference to begin war against the Western Powers unless the latter insured to Japan the fruits of her aggression in China[a]. So great was their love of peace that they gave the Western Powers less than three weeks to accept this proposal[b]. Peace was worth just three weeks time to these lovers of peace. So great was their love of peace that both KAYA and TOGO supported every measure that led to war. Notwithstanding this, these men continue to assert that they didn't want the war. When asked why then they

74a. Ex. 1107, T. 10,332; Ex. 1169, T. 10,333-40; Ex. 1164, T. 10,318; Ex. 1165, T. 10,323; Ex. 2924, T. 25,960; Ex. 2925, T. 25,966.

b. Ex. 1171, T. 10,346; Ex. 1169, T. 10,333.

voted for it if they were so opposed, and why they didn't resign, they then can only say that resignation wouldn't have done any good because others who would have voted for war would have been found to replace them. It is, indeed, a most strange defense to a crime to assert that "if I hadn't committed it, someone else would have done so." This is the defense of the confidence man who would justify his fleecing of his unsophisticated victim on the ground that if he didn't do it, some other confidence man would. Further, these defendants assert that even if they had wanted to resign, they could not do so because it was necessary to show cabinet unity at this time of crisis. Yet just a year later when the war was already raging, the defendant TOGO had no difficulty in reconciling with his conscience his resignation because of matters affecting his prestige as Foreign Minister. No question of cabinet unity disturbed him then. The need for unity was strong enough to rule when it came to a question of conviction and belief but not when it affected personal prestige. We can only conclude that the conviction was not too strong.

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75. The defendant KIDO was another of the lovers of peace. Yet it was he who, with full knowledge that TOJO had wrecked the third KONOYE cabinet because KONOYE wanted more time in which to try for a peaceful solution before abandoning the nation to war when TOJO wanted immediate war, deliberately selected TOJO as Premier and turned Japan's government over to him unequivocally and completely.[a] KIDO establishes his great love for peace by stating that he had, during the third KONOYE cabinet, suggested that Japan abandon her aggressive program. Yet his own diary entry shows that his suggestion was merely that the commencement of the war be deferred for ten years while Japan made more adequate and further preparations.[b]

76. The navy, as represented by the defendants in the dock, loudly proclaim that they were lovers of peace and didn't want war. They point to the fact that at the Ogikuba Conference on October 12, 1941, Admiral OIKAWA took the position that the time had come to determine on war and peace and the decision was up to the Premier, and that prior thereto OKA had stated to the Chief Cabinet Secretary that the navy did not want war but could not come out openly and say so, but that

75. a. Ex. 1152, T. 10,285-7; Ex. 1153-A, T. 10,289; Ex. 2913, T. 25,866-67; Ex. 1154, T. 10,292.
b. Ex. 1130, T. 10,198, 10,201.

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b. Ex. 1130, T. 10,198, 10,201.

it could and would say that it would abide by the Premier's decision.[a] However, when TOJO demanded that the navy declare itself and that if it would come out against war a way could be found to suppress the younger army officers, the navy was silent.[b] Did this show any great desire for peace and opposition to going to war? Or did it show an attempt to shift the onus of the weighty decision to the Premier while the navy stood piously by and said we will do whatever you want but we will not take any responsibility for the decision? Or could it be that the navy leaders, knowing full well that TOJO and the Army General Staff were determined on war as decided, found that this was a convenient way of shifting the entire burden onto the army for a criminal decision which the navy had shared in making? SHIMADA and NAGANO had a final chance to alter the decision for war as late as November 30, 1941. Did they use that opportunity for peace? On the contrary, they assured the war with their statement to the Emperor that it could be successful.[c]

77. None of the evidence offered by the defense establishes that any of the defendants hated war and were men of peace. But even if it did, it would be

76. a. Ex. 2913, T. 25,862-4.
b. Ex. 1148, T. 10,263.
c. Ex. 1198, T. 10,468.

wholly irrelevant and immaterial. Neither motive nor the likes and dislikes of the committer of a crime enter into the question of criminal intent. Many criminals have been convicted although the motives for their crimes were good. It is possible that many criminals dislike doing the criminal acts in which they engage and that all but a few criminals would prefer not to use criminal methods if their objectives could be attained otherwise. The sole test of criminal intent is whether the actor intended to perform the act which the law has designated as criminal. Even if it be true that these men hated war, it is also true that they coveted the lands and wealth of their neighbors. Their hatred for war was not as great as their desire for their neighbors' goods. They would have preferred to get their neighbors' property without going to war. They were, however, determined that they would fulfill their desire even if they had to go to war to do it. When other methods failed, they determined to go to war to achieve their aggressive aims and purposes and they did go to war. The only question is, did they intend to go to war when they did go to war? Of the answer to this question there can be no doubt.

78. In the defense summation on Personal Responsibility, it is alleged that these defendants

cannot be found to have had a criminal intent because they did not know of the illegality of their acts. If this contention were sound law, the facts of the case do not fall within it. These men knew that their acts would result in the killing of thousands of human beings and they knew that that was illegal. They knew Japan had treaties and binding obligations and that they were breaking them, and they knew that that was illegal. The only thing they may not have known was that the poeple of the world were going to become weary of their repeated crimes and in their righteous rage set up a tribunal to try them for their crimes and put an end to unbridled license going unpunished. Moreover, the contention is not sound law. None of the materials cited in support of the proposition establish the principle. All they show is that certain jurisdictions permit the fact of lack of knowledge of criminality to be considered as a fact in mitigation of punishment. None of them establish the proposition that it is a defense. Moreover, it is absolutely impossible to see what purpose is served by the entire argument in view of the admission found on the top of page 4.[a] The defense there clearly state it is settled law that "criminal intent is established where the person in question knew the facts

78. a. Defense Summation Personal Responsibility, p. 4.

which constituted the crime, i.e., his act and the natural and probable consequence thereof, but, when such knowledge is once proved, it is not necessary to further inquire whether or not he was aware of the illegality of his act." We submit that these men knew their acts and th natural and probable consequences thereof. It is therefore unnecessary to consider whether they regarded them as illegal.

79. Wherever at all possible, these defendants attempt to evade the responsibility for the criminal acts which were committed by them and their associates. One of their favorite devices in an effort to avoid responsibility is to charge that the prosecution is attempting to impose upon them vicarious liability. Vicarious liability, as we understand it, means that liability is imposed upon a person without any fault having been committed by the person, in the same way as civil liability is imposed upon a master for the wrongful acts of his servant committed while carrying out the business of his master. The prosecution in no way has asked that any man be held liable because of the acts of another. It merely seeks to impose liability for the acts committed by the person himself.

80. This charge has been used in two ways by the defense. In the first place they charge that holding

a conspirator liable for the substantive offenses committed during the course of a conspiracy is making him liable vicariously for the act of another. It has already been shown that a conspirator by joining the conspiracy necessarily becomes an aider and abettor to the crimes which are the subject of the conspiracy. When he is held liable for the substantive offense committed by some other member of the conspiracy, he is held liable for that offense because of his own act of aiding and abetting the commission of that offense. There is here no case of imposition of vicarious liability. In the second place the defendants charge that the prosecution attempts to impose vicarious liability because it holds a man liable for acts "committed by another" while holding public office. This charge again cannot withstand analysis. The law recognizes that crimes are committed by two classes of acts by an individual -- acts of commission and acts of omission. Acts of commission consist of the actor's own positive acts and he is liable, if those acts are crimes, because of his own acts. Acts of omission consist of those situations where a person has a duty to act and fails to act. If the failure to act results in the commission of a crime, the person who had the duty to act and failed to act is liable criminally for the commission of the crime. His

liability is not for the act which someone else committed but is for his own act of omission in not acting to prevent the criminal act. It is these recognized rules of liability that the prosecution asks the Tribunal to apply. For example, it is a conceded fact in this case that all cabinet decisions had to be unanimous. There could be no decision made if one cabinet member dissented. If a cabinet member voted for a measure which was criminal, he is of course liable for his act of commission. If, as sometimes may have happened, a cabinet minister delegated his task to certain of the other ministers and such others made a decision which was binding as a cabinet decision and was a criminal act, the delegating cabinet member is liable for that decision either because of his prior acquiescence or subsequent failure to disapprove. In holding him criminally liable he is not held for the act of the others but for his own act of commission in acquiescing or for his own act of omission in failing to dissent because without either or both of his acts being committed, the criminal act couldn't have been committed. Likewise, a cabinet minister who has a specific duty can be held liable for an act committed by his subordinate in carrying out his superior's duty. Here again the cabinet minister's liability is not for the act of the subordinate but for his own act of omission in failing

to act by reversing the subordinate. There is, therefore, here again no vicarious liability.

81. It seems to be the burden of the defense contention that a man's liability for an act in this case can be shown only by proving an explicit act of commission. This is manifestly unsound. There are other and equally valuable methods of proof. Since cabinet decisions could only be made unanimously, if a cabinet decision is produced and it is shown that A was a cabinet member at the time the decision was made, since the decision could not have been made without A's approval or acquiescence, it has been shown that A either gave his approval or acquiescence and A's act of commission or omission with respect to the decision has been established. Furthermore, if an act has been committed which the evidence shows is of a nature which requires cabinet action to authorize its commission, since there is a presumption that the act was lawfully authorized through proper cabinet action, the proof of the act in itself and the fact of A being a cabinet member is sufficient to shift to A the burden of going forward with evidence to show that cabinet action was not in fact taken. In the absence of such evidence, the prosecution has produced sufficient evidence to meet the burden of proof on the issue as to A's liability for the act committed.

82. The defendants have resorted to every conceivable device in order to evade the liability that is theirs. Responsibility is shifted. It is shifted from one group to another, from one person to another, from subordinate to superior and from superior to subordinate. Responsibility is minimized. Important governmental bodies become impotent; cabinet offices become mere titles; men entrusted with the highest duties become mere automatons. Responsibility is obliterated. Men boldly state they are beyond the reaches of the law. Every nuance in phraseology, no matter how absurd, fantastic or ridiculous that might possibly be gotten from the language of the Tribunal or the prosecution or any other source, is clutched like a straw by a drowning man in the mad rush of desperation to escape from the liability of acts which in former years these men, who now deny them, proudly boasted as their own.

83. The favorite device of these defendants in avoiding liability is to shift all responsibility to the Supreme Command. In this they are safe from all reprisal. They know full well that every chief of staff of either service who served from 1928 to 1944 is dead. Those who served from 1944 until the surrender in 1945 are in the dock but their liability

incurred in other official capacities is so great that they too are willing to shift responsibility to the Supreme Command. There is no doubt that the Supreme Command must bear a large share of the fault for the criminal acts which were committed, and there is further no doubt that if these chiefs of staff, who are now dead, were living, they would be principal defendants in this case. However, the Supreme Command alone was not responsible. Even if they were the initiators and original proponents of Japan's fundamental policy, they could not have made that policy the basic program of Japan without the aid and assistance of the government. The power of the purse, the basic power in any state, lay with the government and the government alone. Without the active aid and participation of the members of the cabinet and the Privy Council, the Supreme Command would have been powerless. The demands of the Supreme Command might have dictated the policy but without the surrender of the cabinet and its ready acceptance of these demands, the policy could not have been adopted. The Supreme Command did not prepare the peoples' minds for war; it did not make the criminal treaties of alliance, although it wanted them; it could not mobilize the nation economically for war. Cabinet action and

government supervision were needed to carry out these parts of the common plan. And it was the cabinet and other governmental bodies which did carry out these parts of the plan. If we allocate to the Supreme Command its full share of the liability for Japan's crimes of aggression, there is much left for distribution among the defendants.

84. Not only is there this effort to shift responsibility from one group to another, but within a single governmental organ the members of that organ scramble to shift the blame from one group of members to another group. The members of the potent Four Ministers and Five Ministers Conference like HIROTA, HIRANUMA, ITAGAKI and KAYA assert that they were powerless without the acquiescence or approval of the other members of the cabinet, and that nothing they did was of any importance unless approved by those other members. On the other hand, the cabinet members who were not members of the conference, like AMAKI and KIDO, contend they are not liable because these matters were not reported to them for action or if they were reported, that they accepted them solely on the expert advice of the members of the conferences. Thus, within the cabinet itself we have no one who has responsibility for some of the most important actions

taken during the course of execution of the common plan. These contentions avail the defendants nothing. If, in a particular case, the conferees did not report to the other members of the cabinet and did not put the plan into execution, the conferees are still guilty of the crime of planning aggressive war. For the most part the evidence shows that the plans of the conferences were put into action. In those cases, if the matter was not reported to the other cabinet members, the other members (as well as the conferees) are still liable for these acts, since under the Japanese system these matters could be carried out only with the acquiescence of the other members. If the matters were reported, other members are just as liable as if they had accepted after independent judgment. The evidence also shows that for the most part all matters handled by the conferees were regularly reported to the other members at cabinet meetings.[a]

85. Subordinates blame their superiors. They claim that under the law of Japan they were bound to carry out the orders of their superiors, they had no alternative but to obey, and so if the act be criminal, the liability for it belongs to the superior. This

84a. Ex. 2218, T. 15837.

is the plea of superior orders. However, superior orders are not recognized as a defense in international law. The Charter specifically provides that they shall not be so considered but that they can be considered in mitigation. Superior orders are not recognized in international law as a defense to the violation of the laws of warfare. Oppenheim states:[a]

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent."

After pointing out that there might be an exception in the case where the order was not obviously illegal or where the rule of warfare was controversal, Oppenheim states:[b]

"However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit

85b. Oppenheim, Vol. II, p. 453.

acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

Since superior orders are no defense to an illegal act committed under battle conditions, they certainly cannot be a defense to an illegal act of a subordinate in connection with planning and preparing aggressive war at a time and place which were free from the haste and urgency of battle conditions.

86. Superiors blame their subordinates. When confronted with documents which are official documents of executive branches of the government which they headed at the time the documents were prepared, the defendants deny any knowledge of them and say that they were the work of their subordinates. They claim they have not seen a document because their seals do not appear on the face of it. When they are shown documents bearing their seals, they blandly state the seals were imposed by their subordinates and they themselves never saw the documents. It is inconceivable that these defendants would ask this Tribunal to believe they never saw these documents which they say were prepared by their subordinates. These were not minor documents or routine matters. They were documents of utmost importance on the most vital matters being considered by the Japanese government. Moreover, the responsibility for an act of any department under the laws of Japan ultimately falls on the head of the department. If he failed to properly supervise his subordinates, who prepared the document, he is as liable for the criminal act by reason of omission as if he had himself prepared the document.

87. We have heard one of the defendants blame both his subordinates and his superiors in order to absolve himself of responsibility. The defendant HATA denies any responsibility for the demand of the death sentence in the Doolittle Fliers case. He claims that the death sentence was asked for by his subordinate, Major HATA, the prosecutor for the 13th Army.[a] No one has claimed that General HATA, the defendant, went into court himself and demanded the death penalty.[b] The prosecution does claim, as is shown by the evidence, that defendant HATA directed the Prosecutor of the 13th Army (whose name was Major HATA) to demand the death sentence.[c] MIYANO testified in the SAWADA trial:

"Q. Did General HATA request the prosecutor of the 13th Army to ask for the death sentence?

"A He requested the death sentence."[d]

On the other hand, HATA maintains that he acted solely on orders from Tokyo and had no power to review or revise the sentences. This ignores completely the testimony of defense witness SAWADA, the commander

87. a. T. 43,441; Ex. 3868, T.38,620
b. T. 38,620 - the pertinent remark of the President of the Tribunal
c. Ex. 3834-B, T. 38,058-60
d. T. 38,060

of the 13th Army which tried the case, that the order for trial was issued by the defendant HATA. It also ignores the fact that the military ordinance issued by HATA on August 13, 1942, under which the Doolittle Fliers were tried, convicted and executed, contained the provision, "Under special circumstances the execution of military punishment shall be remitted."[f] It is certainly reasonable to inquire why HATA included this provision in the order if he had no authority to act.

88. In their attempt to shift responsibility, the various defendants have set forth conflicting contentions which are mutually incompatible. On the one hand, the defendant HATA, Commander in Chief of the Expeditionary Forces in China from March 1941 to November 1944, while in no way denying the atrocities that occurred throughout the period of his command in every province of China, occupied by troops under his command or in camps under his command, maintains that he was not responsible but that the responsibility rested upon his subordinates, the commanders of area armies and divisions. On the other hand, DOHIHARA and ITAGAKI and others maintain that the

87. e. T. 27,452-3
f. Ex. 1991, T. 14,662, 14,666

responsibility for atrocities belonged to the theater commander and that they as area army commanders were in no way responsible. Both of these contentions cannot be true. In fact, neither of them is true. Both the theater commander and the area army commanders, as well as the subordinate local commanders, were responsible for the mistreatment of prisoners of war and civilian internees. The defense's own testimony is to that effect. Defense witness SAITO in his direct examination stated:[a]

"The Commander in Chief of the Area Army was in direct command of P.W. Camps and the military detention camps, but orders covering the overall management of prisoners were issued by Commander in Chief of the Southern Army Marshal TERAUCHI and received through the Area Army." (Underscoring supplied.)

Each of the commanders in the chain of command is responsible for his own particular acts of malfeasance or misfeasance. The local commander is liable in the first instance. When knowledge of the atrocities came to his superior, the area commander, it was the latter's duty to see that the atrocities were stopped by either ordering and enforcing correct-

88. a. Ex. 3313, T. 30,230

ive action or by removing and replacing the local commander. Likewise, the theater commander had the same responsibility of seeing that the area commanders, his direct subordinates, carried out his orders and their duties. If he did not take corrective measures by issuing corrective orders and replacing area commanders, he too is responsible. The defense evidence makes this abundantly clear. They went to great pains to introduce evidence that HATA gave instructions to troops under his command prohibiting atrocities upon Chinese civilians.[b] If he had the power to issue the orders to the troops under his command, and there can be no doubt that he had that power, then he had the power to see that those orders were obeyed and he had the power to punish for violations of those orders. What has been said about HATA on this point applies equally to MATSUI.

89. When the defendants find it impossible to shift the responsibility which was theirs, they exert tremendous efforts to minimize the importance of the offices they held. This practice has not been limited to those who served in a somewhat subordinate capacity but has been used by those who held the

88. b. Ex. 2558, T. 21,633;
Ex. 2560, T. 21,661;
Exs. 2571 to 2573, T. 21,793 ff.

highest offices. It has been asserted by HIRANUMA with respect to the presidency of the Privy Council. He contends that the function of the Privy Council was only to give advice. Technically, this is true. The Imperial Ordinance Creating and Regulating the Privy Council defines its functions as deliberating and presenting opinions to the Emperor.[a] However, when it was stated that the function of a government organ was advisory under the former Japanese Constitutional system, that expression did not have the same meaning as it has in other governmental systems. It must be remembered that under the Japanese Constitution all powers of government were vested in the Emperor,[b] and theoretically, all subordinates who actually exercised the powers of government were "advisors." This is true even with respect to cabinet ministers. The Constitution itself defined the functions of the ministers of state as advisory.[c] Yet, it certainly could not be maintained from the evidence we have before us that the cabinet ministers were advisors in the sense that their advice could be accepted or rejected. The defendants themselves maintain that

89. a. Ex. 83
b. Ex. 68, Arts. IV to XVI
c. Ex. 68, Art. LV

such advice could not be rejected.[d] In fact, if not in theory, the cabinet exercised the powers of government. Likewise, in the same sense that the cabinet was advisory and only in that sense, the Privy Council was also an advisory body. Under the defense's own theory, its advice could not be rejected. If it did not have the power in theory, it actually did have power to ratify or to veto matters within its province. Even if the Privy Council had been purely advisory, it was recognized expressly as the "Emperor's highest resort of counsel"[e] and would be responsible for the advice given. Furthermore, HIRANUMA contends that the matters upon which the Privy Council had a voice were limited to those contained in Article VI or the Ordinance Creating and Regulating the Privy Council, and he asserts that these matters were of limited scope and did not cover national defense and finance, two of the most important considerations in planning and preparing for war. He does admit that the Privy Council had a part in the promulgation of Imperial Ordinances under Artieles VIII and LXX of the Constitution. When we substitute the provisions of the Constitution themselves for the innocuous looking

89. d. T. 31,329-33; Ex. 3655, T. 36,379-83
e. Ex. 83, Art. VIII.

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89. d. T. 31,329-33; Ex. 3655, T. 36,379-83
e. Ex. 83, Art. VIII.

numbers, we find that the powers of the Privy Council were not so insignificant as HIRANUMA would have us believe, and included vast powers with respect to national defense and finance. Article VIII contains the power to issue Imperial Ordinances in the place of laws when the Diet is not in session in consequence of an urgent necessity to maintain public safety or to avert public calamities.[f] Article LXX grants the power to the government to take all necessary financial measures when the Diet cannot be convoked as to the internal or external condition of the country in case of urgent need for the maintenance of public safety.[g] If we bear in mind that the duration of the annual term of the Diet was only three months,[h] and when we recall from the evidence the great amount of important legislation which was enacted not through the Diet but by Imperial Ordinance, it becomes at once plain that the Privy Council exercised wide legislative powers at least during nine months of the year.

90. The defendant KAYA likewise minimizes the office he held as President of the North China Development Company. He states that there was nothing

89. f. Ex. 68, Art. VIII
g. Ex. 68, Art. LXX
h. Ex. 68, Art. XLII

criminal about it and he was told that it was to maintain order and to give employment to the Chinese people. The story told by this defendant is totally incredible. We have already seen the aggressive purpose of the North China Development Company to exploit China.[a] We, therefore, already know the criminal nature of this organization. Moreover, we must not overlook the fact that when KAYA became president of the company he was not a simple junior official or mere financial expert without knowledge of the purposes of the company. Before becoming president of the company, KAYA had been the Finance Minister in the First KONOYE Cabinet from June 4, 1937 to May 26, 1938.[b] During this crucial year the China war broke out and developed and KAYA, as a cabinet minister, had participated in and was responsible for every important cabinet decision made during that period. He had been a member of the Cabinet which had ordered mobilization of the troops.[c] He had been a member of the Cabinet which had determined on a policy of local settlement rather than settlement with the Chinese Central Government.[d] He had been a

90. a. Prosecution Summation E, Par. E86-93, T. 39,296-308
b. Ex. 111, T. 722
c. Ex. 3260, T. 29,690
d. Ex. 3260, T. 29,684-5; Prosecution Summation E, par. 40-1, T. 39,241-44

member of the Cabinet which decided to send more troops to Shanghai in August 1937.[e] He had been a member of the Cabinet which had refused Japan's attendance at the League of Nations and the Brussels Conference.[f] He had been a member of the Cabinet which had decided the terms to be imposed upon China.[g] He had participated in the decision of the Imperial Conference of January 11, 1938 which decided on the basic China policy.[h] He had been a member of the Cabinet which on January 14, 1938 had decided not to explain Japan's terms to China, and not to deal with the established China Government.[i] He had been a member of the Cabinet which had approved the KONOYE declaration of January 16, 1938.[j] He had been a member of the Cabinet which on December 24, 1937 had decided "The Outline of Measures for the China Incident," which had provided a detailed plan for economic exploitation of China,[k] which had as its aims

90. e. Ex. 2488, T. 20,699-700, Prosecution Summation E, par. 44, T. 39,245
f. Prosecution Summation E, par. 49-50, T. 39,255-57
g. Prosecution Summation E, par. 54, T. 39,261-4
h. Ex. 3264, p. 3, T. 29,844-51
i. Prosecution Summation E, par. 56-7, T. 39,265-7
j. Prosecution Summation E, par. 58, T. 39,267-8
k. Ex. 3263, T. 29,820-3-26-30; Prosecution Summation E, Par. 86, T. 39,296-8

inter alia, as explained by KAYA to Goette, to supply Japan with war materials being consumed in the China conflict and to expand Japan's armament.[1] He had been a member of the Cabinet which had promulgated the laws of April 30, 1938 which established the North China Development Company and the Central China Promotion Company as the organs for execution of the exploitation policy.[m] Against this background KAYA's presidency of the North China Development Company reveals itself in its true light. Here we have one of the principal planners of the exploitation of China himself going out into the field to carry his own plan into execution. In the light of his own statement and in the light of the recorded documented facts of his knowledge and participation, we would be more than gullible to accept his statement that he was told that the company was to maintain order and to give employment to the Chinese. When he went to China to head this company he knew more about the company and its criminal purpose than did probablymany of the people holding cabinet office at that time.

91. The defendant SUZUKI is another of the great minimizers of the positions that he held. When

90. l. T. 3872
m. Ex. 460-A, T. 5261, Prosecution Summation par. 89-91, T. 39,302-4

head of the important Political Section of the China Affairs Board, neither he nor the Board is important, although the evidence is clear that the China Affairs Board handled the entire matter of the exploitation of China. He asserts that it is a grave error to describe the Planning Board as an overall powerful body controlling Japanese economy. The Tribunal has seen the plans drafted by the Planning Board and the evidence shows that they were put into effect. If there had been any doubt as to the importance of the Planning Board, the Ordinance establishing it would completely eliminate that doubt. Article 1 of that Ordinance provides:[a]

"The Board of Planning shall be under the jurisdiction of the Prime Minister and take charge of the following affairs:

"1. Drafting of plans concerning the expansion and employment of the total national resources in times of peace and war and reporting of such plans, together with reasons therefor, to the Prime Minister.

"2. Investigation of the gists of proposals which are submitted by the Ministers to the Cabinet Council and which have an important bearing upon the expansion and employment of the total national re-

91. a. Ex. 71, pp. 1-2

sources in times of peace and war and reporting, together with its opinion, to the Cabinet through the Prime Minister.

"3. Reporting, together with its opinion, to the Cabinet through the Prime Minister with reference to the control of budget for important matters related to the expansion and employment of the total national resources in times of peace and war.

"4. Adjustment and coordination of affairs of various government offices with regard to the making and execution of a national mobilization plan.

"5. Matters concerning the making of a plan for the utilization of the territory and matters concerning the control of affairs of various Government offices as needed by the plan for the utilization of the territory."

Under the Ordinance creating it, the Planning Board was the planning and coordinating organ of the Japanese Government with respect to Japan's total national resources in both times of peace and war. SUZUKI's evaluation of his function as President of the Board of Planning differs considerably from his Premier's judgment that with the appointment of SUZUKI and that of Admiral TOYODA to the Commerce

91 b. Ex. 3216-A, T. 29,168, T. 29,174

Ministry, Japan at last had a real munitions ministry.[b] As a Minister of State, SUZUKI contends that his responsibility for general affairs of state was more or less nominal and certainly less heavy than that of the ordinary ministers of state. It was only less heavy in the sense that the other ministers of state also headed executive departments. SUZUKI, however, had a close counterpart in the presidency of the Planning Board. There is nothing in the record to show that in their capacity as ministers of state (distinguished from their capacity as heads of particular ministries) the other ministers of state had more responsibility than a minister without portfolio. The Constitution does not distinguish between ministers with portfolio and ministers without portfolio; it makes all the ministers of state responsible.[c] It should be noted that none of the defense evidence which claims that HOSHINO, MUTO and OKA attended the Liaison and Imperial Conferences in a secretarial capacity even intimates that SUZUKI attended in any other capacity than as a participating conferee.

92. SUZUKI's penchant for claiming unimportance is only exceeded by that of HOSHINO. Although

91. b. Ex. 3216-A, T. 29,168, T. 29,174
c. Ex. 68, Art. LV.

the evidence establishes beyond doubt that the real government of Manchukuo was in the hands of the General Affairs Board and that the Chief of that Board, always a Japanese, was the real governing head of Manchukuo, HOSHINO modestly claims that he was only one of twenty-seven bureau chiefs. In passing it might be noted that after developing at length that he was, as head of the Board, a Manchukuo official who was criticized for being pro-Manchurian, he gives away the whole story of Japan's position in Manchuria by stating that when he was appointed minister without portfolio and President of the Planning Board in the Japanese Government, the appointment was a promotion.[a] No doubt his promotion was in recognition of his services for Japan in Manchuria. HOSHINO was unimportant as President of the Planning Board and as Minister of State. What has been said about SUZUKI on this point applies equally to HOSHINO. He was unimportant as the Director of the Total War Research Institute. This has been considered previously. He was also unimportant as Chief Cabinet Secretary in the TOJO Cabinet. He was only to take down telephone calls and notes for TOJO. Is it at all credible that a man who had directed the affairs of the vast territory of

92. a. Defense Summation N-7, p. 38, T.44,855

Manchukuo, who had been in charge of the important Planning Board and who had been a cabinet minister was chosen to do work that any competent junior clerk could do? Or is it that TOJO who had worked with HOSHINO in Manchuria found in him a valuable co-worker for bringing about the war that TOJO was insisting be fought?

93. HOSHINO, MUTO and OKA all minimize their importance by claiming that they were only explainers within the Privy Council and secretaries in the Liaison and Imperial Conferences. With respect to the Privy Council, the regulations of that body provide that representatives of ministries, other than the minister (who was ex-officio a Privy Councillor), could attend the deliberations and could make speeches and explanations, but could not vote.[a] The right to make speeches and explanations is no minor right; it implies a power to persuade. As explainers and experts in their respective fields, these men had the power to offer explanations, to argue and to sway the decision. Likewise with respect to the Liaison Conferences, according to the defendant TOGO, all had taken an active part in the conferences and had participated in the debates.[b] TOGO also testified that the drafts

93. a. Ex. 83, Art. XI
b. T. 36,073-84

containing unfounded and unjust accusations against the prosecution. The prosecution's answer to the motions to dismiss at the close of the prosecution case has been treated as a definitive statement of the prosecution's entire case rather than a hurriedly prepared statement of the main evidence against each defendant to show that a prima facie case had been established. Paragraphs K-1 to K-3 of the prosecution summation have been treated not for what they are, a statement showing that each of the defendants in this case was a formulator of Japan's aggressive policy, but for what they are not, a statement that persons who were not formulators of Japan's policy were guilty of no crime. The prosecution statement

97b. (Cont'd) "We did not regard that as amounting to any arrangement binding either the defense or the court. I can only repeat that. I should say binding counsel or the court because you are included, too, Mr. Keenan."

Throughout the colloquy between the court and the chief of counsel the latter made it perfectly clear that the prosecution was not abandoning anything (T. 35,955). The situation is therefore the common one where an offer of stipulation has been made and rejected and should be treated as it is in any court of law following the professional canons as a matter which cannot be made the subject of comment.

merely says that in this case no one who was not a formulator of policy has been charged. It does not state that such persons could not be charged with and convicted of the crimes. The prosecution would have no authority to make such a statement for the simple reason that the Charter, which is binding upon it, holds to the contrary. Even if the prosecution could make and had made a statement of that nature, it would be of no importance in this case. The evidence shows that each of the defendants was a formulator of policy, a conspirator, a participant in the common plan. As such, they are guilty not only of the conspiracy but also of each of the substantive offenses which they themselves or any of their co-conspirators committed, including therein any substantive offense committed by these defendants themselves, regardless of whether they formulated the specific policy with respect to such substantive offenses. They have even gone to the extent of boldly stating that nowhere was there any official record produced of speeches or addresses made by them, although such speeches and addresses have been introduced into evidence. HATA is one to make this rash statement.[a] Yet, the record showed several

97a. Defense Summation N-4, p. 47, T. 43,315

speeches made by him before the Diet Committees in which he stated that the Nine Power Pact should not be allowed to interfere with Japan's operations in China, outlined the purposes of the China Affair which included the crushing thoroughly of the Chiang Kai-shek Government, pledged that when the Wang Regime was established that the army must lend as much help as possible to the new government, affirmed that the army would give every possible assistance, especially military help, to the Wang Regime, and concluded that Japan would concentrate all her ability to exclude any third power which would consistently interfere with the new order in East Asia.

98. These defendants would have us believe that they were powerless puppets inextricably caught in a web of inevitability and victims of a series of untoward and wholly unforeseen accidents. Yet the evidence shows that in this entire case there was not a single event which could in any way be deemed an accident. Not one of the events which have been reviewed before this Tribunal was an accident. Each of them was planned. From beginning to end each and every act was the product of planning, and each of them was planned by these men or some of them in furtherance of the great overall common plan in which

all of them had joined. We can search the entire record and we will not find a single action that was taken without premeditation and calm deliberation. Not a single word of the history of Japan could be written if the word "plan" and its synonyms were eliminated from our vocabularies.

99. Not even the very first event was an accident. From the very beginning a group of officers in the army and certain civilians had a common plan to expand Japan's empire to the Asiatic continent and to take over for Japan the wealth of that continent. They first planned to move into the strategically and economically vital part of China known as Manchuria. They tried to have the government of Japan undertake their project. When this failed, they determined to do it themselves by killing Chang Tso-lin, the ruler of Manchuria. When this failed to achieve the desired result, they planned and carried out a program of propaganda within Japan to build up popular support for their project. At the same time incidents in Manchuria between Japanese and natives fomented and magnified. As the time grew ripe for taking action, since it was apparent that the government in power would not move in the direction desired, they planned to take over the government of Japan in March 1931. When this plan failed to achieve its purpose, they planned to go ahead on their own and to present the government with a fait accompli which it would have to accept. They had within the government fellow conspirators who could assure that the government would accept. Accordingly, they prepared

plans to occupy by military force all of Manchuria to be put into effect as an ostensible measure of self-defense upon the happening of an incident. To ensure that an incident would occur, they planned and prepared the necessary incident. On the night of September 18, 1931, they implemented their plan by creating their planned incident and then taking military action in accordance with plan. As planned, they disregarded the directives of the government to stop their schemes but continued to advance day by day. Within three months they had achieved their complete military objective and were in military control of every strategically vital point in all of Manchuria. The government was forced to accept the results.

100. With the military objective attained, the conspirators planned to consolidate their gains. They planned to stir up an independence movement and have Manchuria declare itself independent. They planned the type of government that Manchuria should have, and they established it. They determined who should be the titular ruler of the area and brought to Manchuria and installed as Emperor Henry Pu-Yi, all as planned. In all of these plans the government was forced to concur and to devise plans to utilize the

results of the conspirator's action. In accordance with plan the government withdrew Japan from the League of Nations. It accepted completely the accomplished facts of the plan. Japanese were installed in the main government posts. Plans for Japanese military control of Manchuria were successfully put into execution. The complete economic exploitation was planned and carried out according to plan. Even the development of the narcotics industry was planned and carried out according to plan. Nothing that occurred happened by chance or because of accident. And the men who formulated these plans were, among others, the very men who are sitting in this dock. The evidence has shown that these men played varying roles but the actions of each were dictated by the needs of the common plan. KOISO and HASHIMOTO were key men in the attempt to take over the government. DOHIHARA and ITAGAKI took an active part in planning and fomenting the incident and planning and carrying out the military and political activities. MINAMI faithfully carried out his role as inside man within the opposition, and then as Governor-General of the Kwantung Leased Territory directed all of the domination and exploitation. ARAKI, HIROTA, HOSHINO, TOJO, ITAGAKI all played

important roles in the planning and execution of the whole program of exploitation and domination. Others played less major roles of more or less importance in the fulfillment of their common plan.

101. No sooner than the conspirators had consolidated their first gains, they began on a second series of plans. MINAMI and UMEZU, commanders of the Japanese armies in Manchuria and in China, together with War Minister HAYASHI, planned to separate North China and Mongolia from China, and action was taken to foment autonomous movements in accordance with those plans. In these actions DOHIHARA once again was a leading figure in their execution. Complete plans for North China were made both in the Kwantung Army and in the General Staff at Tokyo.

102. The conspirators could no longer depend upon a policy of proceeding on their own and then having the government ratify their actions piecemeal. They had to have control of the government. Once more a coup d'etat was attempted. While the coup d'etat failed, its failure was only nominal since HIROTA was only able to form a government upon acceding to the demands of the conspirators in the army, and the government became a full-fledged member

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of the conspiracy. Having overcome their last obstacle and obtained control of the government, the conspirators made sure that they never could lose it. They made sure that one of their members subject to their absolute control would at all times be a member of every government as War Minister. They retained control of the government at all times thereafter, and each succeeding government planned and carried out every move in the common plan. Only once did they almost lose control, but they successfully circumvented that by preventing UGAKI from forming a government. The HIROTA Cabinet made the common plan the basic national policy of Japan, which it defined as the securing of Japan's position on the Asiatic continent by diplomatic policy and "national defense" and the advancing and developing of Japan toward the South Seas. The cabinet prepared detailed plans for the complete domination and exploitation of North China.

103. Unable to accomplish their plans in North China peaceably, the conspirators determined on military action. Once again they planned an incident and once again they created an incident and carried out military operations according to plan. They deliberately determined pursuant to plan

that settlement would be made only with the local authorities and made it impossible to have a settlement. They planned and carried out battles and campaigns on a huge scale, violating at every turn the established rules of warfare. They deliberately refused to grant to China concrete terms of peace and decided to eliminate the Chiang Kai-shek government by force of arms. As in Manchuria, they planned political regimes and economic exploitation and carried out their plans in every detail. They planned a new puppet government for China and planned every step in establishing the Wang Ching-wei government just as had been done in Manchuria earlier. They carried out this plan. Without exception, each and every one of these defendants participated in the formulation of these plans or in their execution. To name only those who participated in a major capacity of the first importance we would have to include ARAKI, HASHIMOTO, HATA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KAYA, KIDO, MATSUI, MUTO, OKA, SHIMADA, SUZUKI, and TOJO. The others also played their roles and played them well.

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104. With the adoption of the basic policy of 1936, it was decided that it would be attained in any way possible, even by going to war if necessary. It was realized that in carrying out this program they might have to resort to war not only against China but also against the Soviet Union and the Western Powers, and it was therefore necessary to gear Japan for war. In accordance with this plan, the conspirators prepared extensive plans for the mobilization of Japan's economy for war and these plans were executed in every detail. They prepared the army and the navy for war. They prepared their strategic plans, naming the Soviet Union and the Western Powers as the nations they would fight and naming the objectives they wanted to attain. They made their plans to prepared the people psychologically for war and those plans were faithfully executed. They planned alliances with the Axis Powers in the event of war and they entered into alliances with Germany and Italy, and the allies together prepared for war. With the Axis Powers they planned to divide the entire world among themselves. Again we would have to name each of the defendants as major contributors to the formulation and execution of all of these plans.

105. They planned to extend their domination

and control to the areas of the South Seas. They planned what areas they would take and how they would be governed. They planned to take French Indo-China by force if necessary. They took Indo-China by military force and through military pressure. They planned to exploit the Netherlands East Indies, and when the latter bravely resisted, they planned to take that area by force. They planned to threaten the United States if it did not give in to Japan's demands that it would have to face Japan as an enemy in the event the United States became involved in war with Germany and did so threaten. They planned to go to war with the United States and Great Britain if those nations did not accede to their demands and give them all they sought. They determined that their demands must be accepted by the date most strategically advantageous for opening war, and they opened war at that time. They planned that the attacks on Great Britain should be made without prior warning and they carried out that plan. They planned that only token warning should be given to the United States. They planned to open war jointly with Germany and Italy and they put that plan into effect. In cooperation with Germany they planned and did divide the areas of conflict with the Western Powers in order to divide

their fighting strength. They planned, prepared and waged all of the wars until the moment they were completely defeated. Again we would have to name all the defendants if we were to list the key formulators and executors of these plans.

106. These were no accidents, no untoward events. These defendants were not mere automatons; they were not replaceable cogs in a machine; they were not playthings of fate caught in a maelstrom of destiny from which there was no extrication. These men were the brains of an empire; they were the leaders of a nation's destiny. It was theirs to choose whether their nation would lead an honored life in the family of nations, willing to settle differences that might arise in an amicable and lawful manner or whether their nations would embark upon a program of aggrandizement and war against the other members of the family of nations and would become a symbol of evil throughout the world. They made their choice. For this choice they must bear the guilt -- a guilt which is perhaps greater than that of any group of men who have stood before the bar of justice in the entire history of the world. These men were not the hoodlums who were the powerful part of the group which stood before the Tribunal in Nuernberg, dregs of a criminal environment

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thoroughly schooled in the ways of crime and knowing no other methods but those of crime. These men were supposed to be the elite of the nation, the honest and trusted leaders to whom the fate of the nation had been confidently entrusted. Some of them were men who were held in high respect and esteem as men of peace and good will by the leaders and representatives of other nations. These men knew the difference between good and evil. They knew the obligations to which they had solemnly pledged their nation. With full knowledge they voluntarily made their choice for evil, to disregard the obligations and to betray the faith which their own people and others had in them! With full knowledge they voluntarily elected to follow the path of war bringing death and injury to millions of human beings and destruction and hate wherever their forces went. They gambled with the destiny of the people of their nation and like common felons everywhere brought only death and hurt and destruction and chaos to those whose care had been entrusted to them. For this choice these men now stand before this Tribunal awaiting judgment. They must be judged for what their acts were and for what they were intended to be. These acts were pursuant to their own choice. They made their choice for aggression and for war and

they made it freely and voluntarily. For this choice they must bear the guilt.

THE PRESIDENT: The Tribunal reserves its judgment and adjourns to a time to be fixed and announced.

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"In addition, in view of the lessons we had learned from the fighting at the outset of the China Incident, we were obliged to reorganize the military cadet system; that is, one year system was extended to two years, the privilege of the reduction of the period of active service which had been enjoyed by those who had passed the examination of the youth training schools was abolished. In 1939 the youth training school' was renamed 'the youth school' and it became a compulsory course. In order to carry out actively the training of the students of the universities which had been inactive, the training became a compulsory instead of an optional course. In addition, the circumstances caused the students to take much more interest in military affairs than ever before. In view of the fact that the war situation demanded the repletion

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